(1)

No. _____

SUPREME COURT, U.S.
FILED

061234 JAN 24 2007

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In The

Supreme Court of the United States

BRADFORD G. BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRADFORD G. BROWN,
Petitioner, pro se
228 Parkway Drive
Sparta, Georgia 31087
(478) 456-6973

QUESTION PRESENTED

Did the Eleventh Circuit err in concluding that Petitioner, pro se, failed to make a substantial showing of the denial of a constitutional right, upon his motion for reconsideration of that court's order dated August 30, 2006, denying Petitioner' application for a Certificate of Appealability ("COA") to appeal the denial by the district court of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence by a person in federal custody ("2255 motion")?

PARTIES TO THE PROCEEDING

Petitioner-Appellant (in circuit appeals court)

- Bradford G. Brown, pro se

Respondent-Appellee

- United States of America

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District court orders were not reported in any official or unofficial reports; Eleventh Circuit orders were not reported in any official or unofficial reports.

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgement on August 30, 2006. App. A-2.

On September 19, 2006, Petitioner timely filed a motion to the Eleventh Circuit for reconsideration of that court's order of August 30, 2006.

On October 26, 2006, the Eleventh Circuit denied Petitioner's Motion for reconsideration of its order denying Petitioner's application for COA. App. A-1. Petitioner seeks review of that judgement on writ of certiorari.

The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court's rules. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the judgement of a federal court of appeals.

Pursuant to Rule 29.4(a), service by first Class United States Mail has this day been made, in addition to the Supreme Court Clerk, as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Appeals Attorney Mark Determan
United States Department of Justice, Tax Division
P. O. Box 502
Washington, DC 20044-0502
(202) 514-5396

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

(set out verbatim)

Constitution of the United States:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Statutes

26 U.S.C. § 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in case of a corporation), or imprisoned not more than 5 years, or both, together with the cost of prosecution.

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28 U.S.C. § 1254(1)

Cases in the courts of appeal may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of the judgement or decree.

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28 U.S.C. § 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgement or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgement or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a period not exceeding sixty days.

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28 U.S.C. § 2253(c)(2)

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(*See* App. B-1 for full text.) 28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

United States Supreme Court Rule

(*See* App. B-3 for full text,) Rule 10 (a)
Considerations Governing Review on Certiorari

Though not complete or controlling, the character of the reasons the Court considers granting a writ is that a United States court of appeals has entered a decision that

sanctioned a decision by a lower court that has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

Federal Cases

(prosecution responsibility standard)
Giglio v. United States, 405 U.S. 150, 153-155 (1972)

> "Failure to present all material evidence to the jury constitutes a violation of due process requiring a new trial."

(prosecution responsibility standard – clarification)
United States v. Bagley, 473 U.S. 667, 678 (1985)

> "False evidence is material if there is a 'reasonable probability' that had it not been introduced, the result would have been different."

(abuse of discretion standard)
Schiavo v. Schiavo, 404 F.3d 1270 (11th Cir. 2005)

> "While the district court conducted *de nova* review of plaintiff's claims, we review the district court's denial of temporary injunctive relief only for an abuse of discretion. This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or if it relies on clearly erroneous fact finding, or it reaches a conclusion that is clearly unreasonable or incorrect."

(ineffective assistance of counsel standard)
Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)

> "The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, and so affects the trial that there is a 'reasonable probability' that, absent counsel's error, the outcome would have been different."

(ineffective assistance of counsel standard – modification)
Lockhart v. Fretwell, 506 U.S. 364, 369 (1993)

> "To show prejudice under *Strickland, a* defendant must demonstrate that counsel's errors were so serious as to deprive him of trial whose result is fair or reliable, not merely that the outcome would have been different. Unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him."

(tax deficiency requirement for tax evasion conviction)
Lawn v. United States, 355 U.S. 339, 361 (1958)

> "While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by filing a fraudulent return cannot stand in the absence of proof of a deficiency, . . . "

(willful ineffective assistance of counsel – standard)
Martin v. United States, 81 F.3d 1083 (11th Cir. 1996)

"PER CURIAM:

Because *Martin* was entitled to appeal his sentence even though he pled guilty, and because the failure to file an appeal constituted ineffective assistance of counsel, we REVERSE and REMAND with instructions to grant relief allowing a direct appeal."

STATEMENT OF THE CASE

On May 12, 1997, IRS Agent Lloyd Neal initiated an audit of Petitioner, which resulted in a referral for criminal prosecution on March 14, 1998. Trial Transcript ("Tr.") Vol. III, at 69-70. The IRS was provided a copy of all books and records that were in the possession of Petitioner. App. E.

On May 2, 2002, Petitioner was indicted (tax evasion, 26 U.S.C. § 7201, for 1993, 1994 and 1995). On March 13, 2003, Petitioner was convicted at the end of a four-day trial for tax evasion for 1994 and 1995, 1993 having been dismissed by the Government on first day of trial. On May 29, 2003, Petitioner was sentenced to 41 months, fined $40,000 and ordered to pay a restitution amount of $3,083,000 ($1,561,400 tax loss, added to $1,521,600 in penalties and interest). App. A-37.

The theory of the Government's case-in-chief was that Petitioner concealed a checking account (at the United Security Bank of Sparta, Georgia) from his accountant, Arthur Smith (and thus the IRS), by concealing said account from Attorney Barbara Geter, the person who was responsible for providing all information to the accountant. Prior to the IRS audit, Accountant Smith completed

and provided to Petitioner returns for 1994 and 1995 that did not reflect the Sparta account. Petitioner never filed said returns. Tr. Vol. I at 75.

In 2001, Petitioner filed returns for 1994 and 1995 that were defensively prepared (i.e., all money for which there was no written proof that it was non-taxable was counted as taxable, resulting in an overstatement of income tax liability) by Accountant Smith. App. E. The filed returns reflected the Sparta checking account. Since the filing occurred after the IRS investigation had been initiated, the Government asserted that Petitioner was simply coming clean because he knew that he was about to be discovered in his attempt to evade (as was reflected by the returns, prepared by Accountant Smith but never filed by Petitioner). Tr. Vol. I at 76-77.

The Government informed the jury (during closing statement) that affirmative acts were necessary for conviction of evasion and that the first affirmative act was as follows:

> Affirmative Act (Tr. Vol. IV, at 15). "Him lying to the agents during the October '98 interview when he said oh, I didn't file my original Form 1040, which included amounts of negative income but a tax due in '93 of 11,000 and a tax due in '94 of 3,000. He didn't file those returns because he said he thought that the income was too high. Well, we've learned through this case that that just wasn't true. That is an affirmative act of evasion."

Upon careful re-examination of the United Security banking records on or about June 19, 2003, Petitioner discovered cashed checks that he wrote to Attorney Barbara Geter and her immediate family members in 1995

and 1996. Also, Attorney Geter wrote a check on the account, dated December 10, 1996 (well before the IRS investigation began). App. C.

On June 23, 2003, after hiring new counsel, Petitioner filed his Motion for New Trial. On July 29, 2003, the motion was denied. App. A-17.

On or about November 3, 2003, Petitioner appealed his conviction in the Federal District Court for the Middle District of Georgia to the Eleventh Circuit Court of Appeals. Petitioner's judgement in the District was affirmed on February 19, 2004. App. A-15.

On March 30, 2004, IRS Agent James Kohler provided to Petitioner $186,945 of nontaxable deposit items that had been counted by the Government as taxable at indictment, trial, and sentencing. Agent Kohler published a report on June 29, 2004 that acknowledged the transfer of the $186,945. App. H. Petitioner passed these deposit items, along with other records in the audit file that Petitioner received from the IRS, to Certified Public Accountant ("CPA") Edisel Collier. CPA Collier produced an amended tax return for 1994 that showed that Petitioner's 1994 tax liability was zero. This amended return was filed with the IRS on January 22, 2005. App. I. Note that tax evasion is not possible without a tax deficiency. *Lawn v. United States*, 355 U.S. 339, 361 (1958).

Petitioner, assisted by his brother, documented these developments in his case very carefully in anticipation of filing a motion for relief under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. The result of this effort was a book (THE CASE, Vol. II, *Constitutional Violations and Innocence*). *See* District Court Docket Entry 87. Included in this book is a chapter,

"Proposed Petition for Habeas". Doc. 94. This Proposed Habeas contains, in addition to many others, the dispositive exculpatory issue:

> "Petitioner was indicted, convicted, sentenced and imprisoned for tax evasion for a year (1994) for which he owed zero tax. The Government held in its possession, since the time of the audit, all the records that demonstrated that dispositive exculpatory fact."

On or about May 27, 2004, Petitioner retained Law Offices of Bruce Steven Harvey; Attorney Mark A. Yurachek was assigned to Petitioner's case to prepare Petitioner's 2255 motion. From that point forward, Petitioner communicated with Attorney Yurachek in writing. Petitioner was very concerned about the possibility that his 2255 motion might fail to assert, as a ground for relief, his most compelling dispositive exculpatory issue.

For eighteen months (May, 2004 through November, 2005), Petitioner, assisted by his brother, continuously wrote letters to Attorney Yurachek to entreat him to make sure that Petitioner's dispositive exculpatory issue was asserted, as a ground for relief, in his 2255 motion. Attorney Yurachek continuously responded by letter indicating that, in his opinion, it would be unwise to make such harsh criticisms of the Government (as it was likely to anger and alienate the presiding judge). App. J.

On May 19, 2005, Attorney Yurachek filed his 2255 motion, without including Petitioner's compelling dispositive exculpatory issue, as a ground for relief. App. L.

This kind of conduct is prohibited by Rule 83.2 of the Local Rules of the United States District Court for the Middle District of Georgia, and is described as attorney

misconduct, further qualified by Rule 1.3 of Rules for Professional Conduct for the State Bar of Georgia. *See* App. B-5.

Petitioner notified the District Court of this attorney misconduct on December 1, 2005. The District Court responded by letter declining to take action to cure this situation. *See* App. K.

On December 1, 2005, Petitioner's brother provided the Court a copy of the book (THE CASE, Vol. II, *Constitutional Violations and Innocence*) which contained all of the letters entreating Attorney Yurachek to make sure that Petitioner's dispositive and exculpatory issues were included in his 2255 motion. All of Attorney Yurachek's responses are included as well. The book was entered into the docket as entry number 87. At this point, the Court had been informed that Attorney Yurachek had put the Court in the position of proceeding toward making its decision on known, erroneous/incomplete material facts.

On June 5, 2006, the District Court denied the 2255 motion that Attorney Yurachek submitted on behalf of Petitioner on May 19, 2005, (Doc. 95), reinforcing the contention that Attorney Yurachek's refusal to include Petitioner's dispositive exculpatory issue was equivalent to "refusal to file the 2255 motion."

Having had his attorney refuse to assert his dispositive exculpatory issue as a ground for relief in his 2255 motion (and without time or funds to obtain new counsel), Petitioner had no choice but to proceed to the Eleventh Circuit Court of Appeals, as a pro se litigant, as Petitioner's attorney had devolved into a Sixth Amendment, non-assistance of counsel issue (a substantial constitutional issue, in its own right).

On June 15, 2006, Petitioner submitted a pro se notice of appeal to the Eleventh Circuit of the United States Court of Appeals from the District Court order, denying the 2255 motion that Attorney Yurachek submitted on May 19, 2005. Doc. 97.

On July 10, 2006, Petitioner submitted a pro se application for a COA to the Court of Appeals for the Eleventh Circuit, entered as Eleventh Circuit Docket No. 06-13443-G ("Cdoc."), with entry date 07/10/2006. Petitioner asserted the three issues:

1. During my indictment, trial, sentencing, and imprisonment (tax evasion for years 1994, 1995), the Government committed the following violations against me:

   - knowingly held in its possession exculpatory records that demonstrated that my 1994 tax liability was zero (*see attached amended 1994 return and affidavit, App. I*);

   - key among these held records were $186,945 non-taxable deposit items that the Prosecution counted as taxable for indictment, conviction and sentencing (*see attached report by IRS Agent James Kohler, dated June 29, 2004, long after direct appeal, App. H).*

2. My attorney, Mark A. Yurachek, refused to raise this issue as a "ground for relief" on my behalf (in spite of being asked in writing over and over again, App. J), as I pursued relief by way of Title 28 U.S.C. § 2255 (*see attached letters, App. J, from Atty. Yurachek, dated 11-01-04, 2-3-05, 2-10-05, 9-23-05).* This compelling and undeniable ground is the heart of my 2255 motion (zero tax liability for 1994 implies, "tax evasion for 1994 is an impossibility"), and without it I am irreparably prejudiced, as neither the Government

nor the Court ever dealt with this incredible fact. *See* App. A-3. Attorney Yurachek's refusal constituted attorney misconduct, and a profound violation of my Sixth Amendment right to Assistance of Counsel.

3. Petitioner notified the District Court of this attorney misconduct on December 1, 2005. *See* District Court Docket Entry ("Doc.") 92. The District Court erred (abuse of discretion) when it characterized this egregious attorney misconduct as, "disagreement with your attorney about the substance of your 2255 petition", and did not address it pursuant to District Court Local Rule 83.2. App. K contains the District Court notice letters from Petitioner and the District Court response letter.

On August 30, 2006, the Eleventh Circuit denied Petitioner's Application for COA. App. A-2.

On September 19, 2006, Petitioner filed a pro se motion to the Eleventh Circuit for reconsideration of that court's order of August 30, 2006. Cdoc. 09/19/2006. Petitioner asserted the three issues:

Issue 1. Fifth Amendment Right to Due Process – Denial

During my indictment, trial, sentencing, and imprisonment (tax evasion for years 1994, 1995), the Government:

- knowingly held in its possession exculpatory records that demonstrated that my 1994 tax liability was zero (*see attached amended 1994 return and affidavit, App. I*);
- key among these held records were $186,945 nontaxable deposit items that the Prosecution counted as taxable for indictment,

conviction, and sentencing (*see attached report by IRS Agent James Kohler, dated June 29, 2004, long after direct appeal, App. H*).

Issue 2. Sixth Amendment Right to Assistance of Counsel – Denial

My attorney, Mark A. Yurachek, refused to raise this crime as a "ground for relief" on my behalf (in spite of being asked in writing over and over again, App. L), as I pursued relief by way of Title 28 U.S.C. § 2255 *(see attached letters, App. J, from Atty. Yurachek, dated 11-01-04, 2-3-05, 2-10-05, 9-23-05).* This compelling and dispositive ground is the heart of my 2255 motion (zero tax liability for 1994 implies, "tax evasion for 1994 is an impossibility"), and without it I am irreparably prejudiced, as neither the Government nor the Court ever dealt with this incredible fact. *See* grounds for relief asserted by Atty. Yurachek, App. L, and App. A-3 for District Court ruling. Attorney Yurachek's refusal constitutes attorney misconduct, and a profound violation of my Sixth Amendment right to Assistance of Counsel.

Issue 3. Abuse of Discretion (Knowingly Tolerated Denial of 6th Amendment Right to Assistance of Counsel)

Petitioner notified the District Court of this attorney misconduct on December 1, 2005. *See* App. K or District Court Docket Entry ("Doc.") 92. The District Court erred (abuse of discretion) when it characterized this egregious attorney misconduct as, "disagreement with your attorney about the substance of your 2255 petition", and did not address it pursuant to District Court Local Rule 83.2. *See* Doc. 88. App. K contains the District Court notice letters from Petitioner and the District Court response letter.

On October 26, 2006, the Eleventh Circuit denied Petitioner's Motion for reconsideration of its order denying Petitioner's application for COA. App. A-1.

On August 13, 2006, Petitioner was released from federal custody, at which time he, with the help of loved ones, proceeded to meticulously examine the records of the audit file to correct the 1995 tax return that had been defensively prepared by Accountant Smith. The uncovered records were passed along to a tax return preparer, and resulted in an amended tax return for 1995 that showed that Petitioner's 1995 tax liability was zero, This amended return was filed with the IRS on January 11, 2007. App. M. Note that tax evasion is not possible without a tax deficiency. *Lawn v. United States,* 355 U.S. 339, 361 (1958).

REASONS FOR GRANTING THE PETITION

I.

THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER CLEAR VIOLATIONS OF THE CONSTITUTIONAL RIGHTS OF AN AMERICAN CITIZEN, IN THE FACE OF ACTUAL INNOCENCE, WILL BE TOLERATED BY THE AMERICAN JUDICIAL SYSTEM.

A. Zero tax liability for all conviction years, 1994 and 1995, implies innocence of tax evasion. Petitioner's tax liability for both conviction years, 1994 and 1995, was zero. *See* App. I and App. M. Tax evasion is impossible without a tax deficiency. *Lawn v. United States,* 355 U.S. 339, 361 (1958). Therefore, Petitioner is actually innocent, and the information that resulted in zero tax liability for Petitioner was dispositive and exculpatory.

B. Failure to act on and inform the jury of dispositive exculpatory evidence (in its possession) was a Fifth Amendment due process violation by the Government. This standard was articulated by the Court in *Giglio v. United States*, 405 U.S. 150, 153-155 (1972), where in pertinent part these are the words of the Supreme Court:

> "Failure to present all material evidence to the jury constitutes a violation of due process requiring a new trial."

The word "material" was clarified by the Supreme Court in the case *United States v. Bagley,* 473 U.S. 667, 678 (1985), where in pertinent part, it states:

> "False evidence is material if there is a 'reasonable probability' that had it not been introduced, the result would have been different."

After the audit, the Government had all of the information that Petitioner had, and more. Therefore, the Government committed a violation of due process when it did not inform the jury that Petitioner's tax liability for the conviction years, 1994 and 1995, was zero.

C. Failure of trial attorney to discover and assert the dispositive exculpatory evidence was a Sixth Amendment ineffective assistance of counsel violation. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established a two-prong test for ineffective assistance:

1. must show counsel's performance was deficient (Id at 687);
2. Petitioner incurred prejudice (Id. at 687).

(First) Counsel did not compel Government witness, IRS Agent Lloyd Neal, to provide the information that Petitioner obtained from IRS Agent Kohler on March 30, 2004

(App. H), which eventually resulted in the establishment of a zero tax liability for conviction year, 1994, and neither did Counsel produce the zero tax liability for conviction year, 1994. (Second) Petitioner was convicted of tax evasion for 1994 (which would not been possible had Counsel produced the zero tax liability for 1994). The results of the trial were therefore fundamentally unfair and unreliable. Thus prejudice resulted, in the sense of *Strickland,* as modified by *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993).

D. Failure of sentencing attorney to discover and assert the dispositive exculpatory evidence was a Sixth Amendment ineffective assistance of counsel violation, *Strickland v. Washington,* 466 U.S. 668 (1984), as modified by *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993).

E. Failure of direct appeal attorney to discover and assert the dispositive exculpatory evidence was a Sixth Amendment ineffective assistance of counsel violation. *Strickland v. Washington,* 466 U.S. 668 (1984), as modified by *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993).

F. Refusal of Petitioner's 2255 attorney to raise the dispositive exculpatory issue as a "ground for relief" (in spite of being asked in writing over and over again) was clear attorney misconduct and a violation of Petitioner's Sixth Amendment right to assistance of counsel. Petitioner did not rely on his 2255 motion attorney to discover the dispositive exculpatory evidence, Petitioner presented said evidence to his 2255 motion attorney. *See* App. J for the letters between Petitioner and his 2255 motion attorney, where Petitioner was entreating his attorney to put forward Petitioner's dispositive exculpatory evidence throughout a period of more than a year (from March of 2004 through November of 2005). When Counsel submitted the 2255

petition, without including Petitioner's dispositive exculpatory issue, he did so knowingly. His conduct was equivalent to willful refusal to file said petition, which is willful ineffective assistance. *Martin v. United States,* 81 F.3d 1083 (11th Cir. 1996), as follows:

> "PER CURIAM:
> Because *Martin* was entitled to appeal his sentence even though he pled guilty, and because the failure to file an appeal constituted ineffective assistance of counsel, we REVERSE and REMAND with instructions to grant relief allowing a direct appeal."

As well, we have ineffective assistance in the sense of *Strickland v. Washington,* 466 U.S. 668 (1984), as modified by *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993).

II.

THE REFUSAL OF THE DISTRICT COURT (AFTER WRITTEN NOTIFICATION AND SUBSTANTIATION) TO CURE THE ATTORNEY MISCONDUCT WAS ABUSE OF DISCRETION PURSUANT TO LOCAL RULE 83.2 AND RULE 1.3 OF THE RULES OF PROFESSIONAL CONDUCT FOR THE STATE BAR OF GEORGIA.

Petitioner notified the District Court of the attorney misconduct on December 1, 2005, by writing a letter (App. K) to the District Court. The District Court responded by letter as follows:

> "I have your letter of November 30, 2005, in which you request that I order the Grievance Committee to investigate Mark Yurachek's

> handling of your section 2255 petition for relief. I do not believe that your disagreement with your attorney about the substance of your section 2255 petition is the proper subject of a Grievance Committee investigation and I decline to refer the matter to them."

This did not address it pursuant to District Court Local Rule 83.2. *See* App. K which contains the notice letters to the District Court from Petitioner and the District Court response letter.

On December 1, 2005, Petitioner's brother (as Petitioner was in Maxwell Air Force Base Federal Prison Camp, Inmate # 91022-020) provided to the Court a copy of the book (THE CASE, Vol. II, *Constitutional Violations and Innocence*) which contained all of the letters entreating Attorney Yurachek to make sure that Petitioner's dispositive and exculpatory issues were included in his 2255 motion. Attorney Yurachek's responses are included as well. The book was entered into the docket as entry number 87. At this point, that Court had been informed that Attorney Yurachek had put that Court in the position of proceeding toward making its decision on materially erroneous or incomplete facts.

On June 5, 2006, the District Court denied the 2255 motion that Attorney Yurachek submitted on behalf of Petitioner on May 19, 2005, (Doc. 95), basing its ruling on known materially erroneous or incomplete facts, thereby abusing its discretion, as articulated in *Schiavo v. Schiavo,* 404 F.3d 1270 (11th Cir. 2005).

III.

THE REFUSAL OF THE ELEVENTH CIRCUIT TO GRANT A COA CONSTITUTED THE SANCTIONING OF THE FAR DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER.

The Eleventh Circuit articulated the standard for judging "abuse of discretion" in its ruling in the case *Schiavo v. Schiavo,* 404 F.3d 1270 (11th Cir. 2005), where it states in pertinent part:

> "While the district court conducted *de nova* review of plaintiff's claims, we review the district court's denial of temporary injunctive relief only for an abuse of discretion. This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or if it relies on clearly erroneous fact finding, or it reaches a conclusion that is clearly unreasonable or incorrect."

Since the District Court knew that the 2255 petition submitted by Atty. Yurachek was materially erroneous or incomplete (having been informed in writing by Petitioner – App. K), it relied on clearly erroneous fact finding. Having been informed of District Court's abuse of discretion by Petitioner in his Application for COA (Cdoc. 07/10/2006) and again in his Motion for Reconsideration (Cdoc. 09/19/2006), the refusal of the Eleventh Circuit to grant a COA constituted the sanctioning of the far departure by the District Court from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power, pursuant to Rule 10(a).

A. Since the conduct of Petitioner's 2255 attorney was equivalent to willful refusal to file said petition, the refusal of the Eleventh Circuit to grant a COA was in direct contradiction to its standard articulated in *Martin v. United States,* 81 F.3d 1083 (11th Cir. 1996).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRADFORD G. BROWN
Petitioner, pro se
228 Parkway Drive
Sparta, Georgia 31087
(478) 456-6973

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13443-G

BRADFORD G. BROWN,

Petitioner-Appellant,

versus

U.S.A.,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(Filed Oct. 26, 2006)

Before BIRCH and WILSON, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated August 30, 2006. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Arthur v. Allen*, 452 F.3d 1234, 1249 (11th Cir.), *opinion modified on other grounds*, 459 F.3d 1310 (11th Cir. 2006); *United States v. Schier*, 438 F.3d 1104, 1106 n.1 (11th Cir. 2006).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13443-G

BRADFORD G. BROWN,

Petitioner-Appellant,

versus

U.S.A.,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(Filed Aug. 30, 2006)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES
CIRCUIT JUDGE

2006 WL 1582421

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

BRADFORD G. BROWN,	:	
Petitioner,	:	
v.	:	**Criminal Action No. 3:02-CR-14(HL)**
UNITED STATES OF AMERICA.	:	

ORDER

(Filed Jun. 05, 2006)

Before the Court is a Report and Recommendation (Doc. 85) from United States Magistrate Judge G. Mallon Faircloth that recommends denying Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Petitioner has subsequently filed an objection (Doc. 86). Pursuant to 28 U.S.C. § 636(b)(1), the Court has thoroughly considered Petitioner's objection and has made a de novo determination of the portion of the recommendation to which Petitioner objects. For the reasons stated below, the recommendation is accepted and Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is denied.

I. FACTS

On May 2, 2002, a grand jury returned a three count indictment charging Petitioner with (1) tax evasion for the calendar year 1993, (2) tax evasion for the calendar year

1994, and (3) tax evasion for the calendar year 1995. Prior to trial, the Court granted the Government's oral Motion to Dismiss Count One; however, Petitioner proceeded to trial on Counts Two and Three. On March 13, 2003, Petitioner was convicted on the two remaining counts. Petitioner was sentenced on May 29, 2003 to a term of imprisonment of forty-one months for Count Two and a concurrent term of imprisonment of forty-one months for Count Three. Petitioner was also ordered to pay restitution and a fine. Petitioner pursued a timely direct appeal to the United States Court of Appeals for the Eleventh Circuit; however, the Eleventh Circuit affirmed Petitioner's convictions and sentence.

Petitioner then filed the habeas corpus petition currently before the Court on May 19, 2005 asserting six different claims for relief: (1) a procedural due process claim based on an alleged *Brady* violation;[1] (2) an ineffective assistance of counsel claim regarding Petitioner's trial counsel for failing to respond to the alleged Brady violation; (3) an ineffective assistance of counsel claim regarding Petitioner's appellate counsel for failing to raise the alleged Brady violation on appeal; (4) a Fifth and Sixth Amendment claim based on an allegedly insufficient indictment; (5) a Sixth Amendment claim based on the alleged improper premature deliberations of the jury; and, (6) an ineffective assistance of counsel claim regarding both Petitioner's trial and appellate counsel for failing to

[1] In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197-98 (1963), the Supreme Court of the United States held that the suppression of evidence favorable to a defendant by the prosecution upon request violates due process. Violations of the Court's holding in *Brady* are generally referred to as *Brady* violations.

respond to the alleged improper premature deliberations of the jury.

The matter was referred to Magistrate Judge Faircloth and he submitted his Report and Recommendation on November 10, 2005. The Magistrate Judge recommended that all of Petitioner's claims be denied.[2] Petitioner subsequently filed objections to the Magistrate Judge's Report and Recommendation arguing that the Magistrate Judge had reached an incorrect result as to Petitioner's first three claims. As Petitioner failed to raise objections to his fourth, fifth and sixth claims, the Court, pursuant to 28 U.S.C. § 636(b)(1), will not address those claims here.

II. ANALYSIS

A. Brady Violation

As an initial consideration, the Court notes that Petitioner did not raise this issue on direct appeal. As such, Petitioner is barred from raising this claim now on collateral attack unless Petitioner can show cause for his failure to raise the issue and actual prejudice resulting from the error. *Cross v. United States,* 893 F.2d 1287, 1289 (11th Cir. 1990). Normally, a petitioner is required to make this showing before a court will address the merits of the issue in question; however, here the components necessary to allege a *Brady* violation already include a "cause" and "prejudice" requirement. *See Banks v. Dretke,* 540 U.S. 668, 691 124 S.Ct. 1256, 1272 (2004). Therefore, if Petitioner can

[2] As the Magistrate Judge thoroughly explained his reasoning in his Report and Recommendation already filed in the case, the Court will not repeat his reasoning here.

succeed in establishing a *Brady* violation, Petitioner will also automatically establish the "cause" and "prejudice" requirements necessary for overcoming the failure to assert this claim on direct appeal. *Id.* Accordingly, the Court will proceed with a discussion of the elements necessary to establish a *Brady* violation.

"In order to establish a *Brady* violation, a defendant must prove: (1) that the government possessed evidence favorable to the defense, (2) that the defendant did not possess the evidence and could not obtain it with any reasonable diligence, (3) that the prosecution suppressed the evidence, and (4) that a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense."[3]

---

[3] Petitioner argues that it is not necessary to show that he did not possess the evidence and could not have obtained the evidence with any reasonable diligence in order to establish a *Brady* violation. In his Report and Recommendation Magistrate Judge Faircloth cited *United States v. Meros,* 866 F.2d 1304, 1308 (11th Cir. 1989), as authority for the four part test utilized by the Eleventh Circuit for establishing a *Brady* violation. One component of the test explained in *Meros* is that a defendant must show that he did not possess the evidence and could not have obtained the evidence through reasonable diligence. Petitioner contends that the United States Supreme Court, one year later, in *Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936 (1999) "narrowed the criteria" for establishing a *Brady* violation. *See Id.* at 281-82, 119 S.Ct. at 1948 ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.). Petitioner accordingly argues that the standard set forth in *Strickler,* rather than the standard set forth in *Meros,* is applicable.

Although the *Strickler* Court did not include a showing that the defendant did not possess the evidence or could not have obtained the evidence with reasonable diligence as a necessary element in establishing a general *Brady* violation, the *Strickler* decision does not invalidate

(Continued on following page)

United States v. Schier, 438 F.3d 1104, 1106 n. 1 (2006) (citing *Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002)).

Further, *Brady* requires only that the prosecution disclose evidence; *Brady* does not require the prosecution to identify possible theories of defense or assist in the presentation of the defense's case. *See United States v.*

---

the long standing precedent in the Eleventh Circuit that the prosecution is not required under *Brady* to provide a defendant with evidence the defendant already possesses or could obtain through reasonable diligence. Contrary to Petitioner's assertion, the *Strickler* decision did not narrow the criteria for establishing a *Brady* violation; the Supreme Court of the United States has consistently employed the same basic test in analyzing potential *Brady* violations. *Compare Brady*, 373 U.S. at 87, 83 S.Ct. at 1197-98 (holding suppression of evidence favorable to the accused amounts to a denial of due process), *with Strickler*, 527 U.S. 263, 119 S.Ct. at 1948 (holding when evidence favorable to the accused and suppressed by the state causes prejudice a violation of due process occurs). Further, in *Strickler* the Court neither reviewed the Eleventh Circuit's test nor addressed whether a defendant could establish a *Brady* violation by alleging that the prosecution failed to provide evidence he or she already possessed. *See generally Strickler*, 527 U.S. 263, 119 S.Ct. at 1948

Moreover, numerous United State Courts of Appeals have consistently held that because the purpose of *Brady* is to assure access to evidence known to the government yet unknown to the defendant, that there can be no *Brady* violation when a defendant already has the alleged exculpatory evidence or could obtain said evidence through the exercise of reasonable diligence. *United States v. Bender*, 304 F.3d 161, 164 (1st Cir. 2002), *cert. denied*, 537 U.S. 1167, 123 S.Ct. 980 (2003), *United States v. Runyan*, 290 F.3d 223, 245-46 (5th Cir. 2002), *cert. denied*, 537 U.S. 888, 123 S.Ct. 137 (2002), *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, 528 U.S. 842, 120 S.Ct. 110 (1999), *Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1995), *cert. denied*, 516 U.S. 1133, 116 S.Ct. 956 (1996). Despite having numerous occasions to address the issue, the Supreme Court has yet to do so. *Id.* Therefore, this Court is bound by Eleventh Circuit precedent and will proceed accordingly.

Marrero, 904 F.2d 251, 261 (5th Cir. 1990) ("[*Brady*] does not place any burden upon the Government to conduct a defendant's investigation or assist in the presentation of the defense's case."), *United States v. Fountain,* 83 F.3d 946, 949 (8th Cir. 1996) (holding the Government has no duty to highlight inconsistencies between witness statements). Finally, "neither mere speculation that the prosecution might possess information helpful to the defense nor base assertions, without more, of the presence of exculpatory information in the prosecution's files would be sufficient to warrant a *Brady* determination." 25 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 616.06[2] (3d ed. 1997).

Here, Petitioner has alleged that certain source documents utilized by Internal Revenue Agent Neal, who was assigned to Petitioner's criminal file, in computing Petitioner's tax liability were not turned over to the defense in violation of *Brady.* Subsequent to Petitioner's trial, conviction, and sentence, the Internal Revenue Service assigned another agent, Agent Kohler, to arrange for the civil settlement of Petitioner's tax liability. According to Petitioner, there are several inconsistencies between the returns prepared by Agent Neal and Agent Kohler. Petitioner argues that had he been provided with all the source documents used by Agent Neal prior to trial he would have been able to hire an expert to combat Agent Neal's allegedly erroneous findings. Although it is difficult to determine exactly which source documents Petitioner is claiming he was not provided, it is clear that the documents are deposit slips, checks, and receipts that presumably correspond to the inconsistencies between Agent Neal's report and Agent Kohler's report.

Assuming that Petitioner can establish that the allegedly withheld source documents contained evidence favorable to the defense and that had the evidence been provided, the outcome of the proceeding would have been different, Petitioner has not established that he did not already possess, or that he would have been unable to procure through reasonable diligence, the source documents allegedly withheld by the prosecution or that the allegedly withheld source documents were in fact suppressed by the government.

First, Petitioner has not shown that he did not already possess, or that he would have been unable to procure through reasonable diligence, the source documents allegedly withheld by the prosecution. In fact, Petitioner admits that many of the source documents were in his possession and that the remaining documents were within the control of financial institutions with which Petitioner conducted business. Therefore, according to Petitioner's own admission, the documents allegedly withheld by the prosecution were either already in his possession or could have been easily gathered from the banks with which Petitioner conducted business. Accordingly, Petitioner has not established that he did not posses, or could not have obtained through reasonable diligence, the source documents allegedly withheld by the Government and therefore cannot establish a *Brady* violation.

Second, Petitioner has not established that the prosecution suppressed the source documents in question. The Government asserts that Petitioner's attorney was provided with numerous opportunities to examine its entire case file prior to trial. Further, when Petitioner's attorney could not arrange for a mutually agreeable time and date on which to copy the file, Petitioner was provided with

copies of the entire file by the government. Petitioner does not dispute that his attorney was presented with both the opportunity to examine the file or that the government provided Petitioner with copies of its file. In fact, Petitioner never even asserts, much less provides evidence to support, that the copies of the prosecution's file provided to his attorney did not contain the very source documents which Petitioner now alleges were suppressed.

In contrast, Petitioner argues that whether or not the Government provided defense counsel with an opportunity to view and eventually copies of its entire file is irrelevant, because Petitioner was never provided with a precise list of the material used by Agent Neal in computing Petitioner's tax liability. However, Petitioner provides no authority for his assertion that *Brady* requires the prosecution to not only provide a defendant with access to exculpatory evidence but also aid the defense in developing possible theories of defense.

As discussed above, *Brady* does not require the prosecution to assist in presenting the defense's case, disclose possible theories of defense, or highlight inconsistencies between witness statements. *Brady* simply requires the prosecution to provide a defendant with access to evidence that may be helpful to his or her defense. Further, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972). Therefore, after providing Petitioner the source documents used by Agent Neal in computing Petitioner's tax liability, the prosecution was under no further obligation to sift through the documents already provided to the

defense and identify which documents might be particularly relevant to Petitioner's defense.

As Petitioner has not established that he did not already possess, or that he would have been unable to procure through reasonable diligence, the source documents allegedly withheld by the prosecution or that the allegedly withheld source documents were in fact suppressed by the government, Petitioner has failed to meet his burden. Therefore, Petitioner's claim alleging a violation of the principals set fourth in *Brady* is denied.

B. Ineffective Assistance of Counsel

In *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), the United States Supreme Court set forth a two-part test to evaluate ineffective assistance of counsel claims.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

Petitioner argues that his trial and appellate counsel were ineffective for failing to object to the government's alleged failure to provide Agent Neal's source documents to the defense. Yet, Petitioner has failed to establish that the documents were withheld, that he did not already possess the documents, or that a *Brady* violation occurred. Therefore, the Court cannot conclude that Petitioner's trial or appellate counsel were ineffective for failing to object to an alleged *Brady* violation which Petitioner cannot establish actually occurred.

Petitioner also now argues that assuming the government actually provided the allegedly withheld source documents to the defense, his trial and appellate counsel were ineffective for failing to incorporate the documents into the defense. Although Petitioner asserts that his various counsel were ineffective when they failed to utilize the allegedly withheld source documents, Petitioner has offered little evidence or legal argument to back up his claim. Petitioner has failed to identify the exact documents he believes his counsel should have utilized or the exculpatory nature of those documents. Petitioner has also failed to demonstrate why the use of those specific documents would have had an impact on the outcome of the trial. Accordingly, Petitioner has not established either that his counsels' performances were deficient for failing to utilize certain source documents or that the allegedly deficient performances prejudiced the defense.

III. Conclusion

In conclusion, the Court accepts the Magistrate Judge's Report and Recommendation and thereby denies

Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

SO ORDERED, this the 5th day of June, 2006.

/s/ Hugh Lawson
HUGH LAWSON, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

BRADFORD G. BROWN	*	
Petitioner	*	CR CASE NO:
vs.	*	3:02-CR-14-HL
UNITED STATES OF AMERICA,	*	CIV CASE NO: 3:05-cv-38-HL
Respondent	*	

JUDGMENT

(Filed June 6, 2006)

Pursuant to the order of this Court filed June 5, 2006 and for the reasons stated therein, JUDGMENT is hereby entered adopting the report and recommendation of the U.S. Magistrate Judge and denying petitioner's motion for relief under 28 U.S.C. Section 2255.

This 6th day of June, 2006.

Gregory J. Leonard, Clerk

/s/ C.A. Lunsford
Deputy Clerk

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12912

D.C. Docket No. 02-00014-CR-001-HL-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRADFORD G. BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(February 19, 2004)

Before ANDERSON, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

After oral argument and careful review, we readily conclude that the judgment of the district court is due to be affirmed. The particular arguments appellant makes with respect to his assertion of a statute of limitations bar are without merit; we conclude that a reasonable jury could find affirmative acts of appellant intended to conceal the relevant wrongdoing at issue.

Appellant's sufficiency arguments are wholly without merit. Appellant's arguments with respect to instructions concerning failure to file returns as a lesser included offense are without merit because a proper request was not made, and because appellant urges a lesser included offense test inconsistent with *Schmuck v. U.S.*, 489 U.S. 705, 109 S.Ct. 1443 (1989). Appellant's arguments relating to instructions on willfulness and good faith are without merit. With respect to appellant's evidentiary arguments, we find no plain error, and with respect to any other arguments asserted on appeal, we find no reversible error.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	
v.	*	Criminal No. 3:02-cr-14-HL
BRADFORD G. BROWN,	*	
Defendant.	*	

ORDER

(Filed Jul. 29, 2003)

This matter is before the Court on Defendant's motions for new trial, which have been filed pursuant to Federal Rule of Criminal Procedure 33. Bradford G. Brown ("Defendant") was convicted by jury on March 13, 2003 of federal income tax evasion for the tax years 1994 and 1995. After hiring new counsel, Defendant filed his original Motion for New Trial ("Motion One") on May 23, 2003 alleging: (1) ineffective assistance of counsel; (2) that the trial court erred in finding that the statute of limitations for the 1994 count had not expired; (3) insufficiency of the evidence; (4) improper jury instructions; and (5) failure to give the jury a good faith defense charge. On June 13, 2003, Defendant filed an amendment to his original motion ("Amendment to Motion One"), alleging that the outcome of the trial was adversely affected by perjured testimony and adding a new basis for his ineffective assistance claim. On June 23, 2003, Defendant filed a second Motion for New Trial ("Motion Two"), citing newly discovered evidence as a ground for relief. Each motion

will be addressed in turn. For the following reasons, the Court hereby denies both of Defendant's motions.

FACTUAL BACKGROUND

In September of 1981 Dr. Bradford G. Brown began his medical practice, specializing in gynecology and family medicine. (Tr. Vol. I at 87.) To date, Brown has maintained medical offices in several Georgia communities over the course of his career. (Tr. Vol. I at 87, 91.) At some point in the early 1980s, Brown hired an accountant, Stephen Ginn, to prepare tax returns and provide various other accounting services for his medical practice. (Tr. Vol. I at 150-151.) The two agreed that Brown would deposit all receipts from his medical practice into a business bank account and that the amount reflected on the records from that account would represent his total gross income. The resulting figure would then be included on Brown's business tax return as a basis for determining Brown's annual tax liability. (Tr. Vol. I at 153-155.) Ginn discontinued his service as Brown's accountant after only a couple of years, based partially on Ginn's belief that Brown was not disclosing all of his medical receipts for inclusion on his tax return. (Tr. Vol. I at 158-160.)

Brown next hired Arthur Smith to be his new accountant (Tr. Vol. II at 11), and as with his prior association with Stephen Ginn, Smith informed Dr. Brown that he would use Brown's monthly bank statements as a basis for calculating his annual gross income (Tr. Vol. II at 29-31, 33-34, 37-38). At various times during Dr. Brown's relationship with Mr. Smith, Brown maintained three separate bank accounts – (1) Dr. Bradford G. Brown, MD, PC (2) Bradford G. Brown Medical Center, and (3) Brown

Development Corporation – into which receipts for medical services were deposited. (Tr. Vol. II at 26, 38-39, 44-45.) Smith testified, however, that he was not informed about the existence of the Brown Development bank account until the Internal Revenue Service began its investigation into Dr. Brown's tax affairs in 1997. (Tr. Vol. II at 44,) Because Smith derived Dr. Brown's gross income from the figures reflected on the monthly bank records, the upshot of Brown's continuing to deposit money into an account unknown to Smith was that large portions of income went unreported to the IRS.

During the years at issue in this case, 1994 and 1995, Dr. Brown employed his sister, Barbara Geter, to deposit medical receipts into his various bank accounts. (Tr. Vol. I at 116.) The defense contended at trial that by delegating most of the administrative responsibilities to his sister, Dr. Brown effectively distanced himself from the day-to-day duties associated with running his medical practice and, therefore, could not be guilty of acting willfully to evade his income taxes for 1994 and 1995. (Tr. Vol. I at 78-79, 85) The defense argued that confusion resulted from allowing Ms. Geter to handle the dealings with Brown's accountant (Tr. Vol. I at 84-85) and that this confusion, combined with events in Ms. Geter's hectic life as a law student, resulted in a significant portion of unpaid taxes (Tr. Vol. I at 85).

On March 13, 2003, a jury found Brown guilty on two counts of violating 26 U.S.C. § 7201 for the tax years 1994 and 1995. Section 7201 provides, in pertinent part, that "any person who willfully attempts . . . to evade . . . any tax imposed by this title . . . shall . . . be guilty of a felony." 26 U.S.C.A. § 7201 (2002). Defendant filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit in this Court on May 23, 2003. Defendant

filed motions for a new trial in this Court on May 23, 2003 and June 23, 2003.

DISCUSSION

Motions for new trial are governed by Rule 33 of the Federal Rules of Criminal Procedure ("Rule 33"), which provides that a new trial may be granted upon defendant's motion if the "interests of justice so requires." Fed. R. Crim. Pro. 33. It is well settled that the power to grant a new trial is left to the sound discretion of the trial court. *United States v. Champion,* 813 F.2d 1154, 1170 (11th Cir.1987); *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir. 1985); *United States v. Russo,* 717 F.2d 545, 550 (11th Cir. 1983). Rule 33 imposes two different filing deadlines depending on whether the motion is based upon "newly discovered evidence" or some "other" grounds. Fed. R. Crim. Pro. 33(b)(1) & (2). Motions that rely on grounds other than newly discovered evidence must be filed within the first seven days following the verdict, or within any other time period prescribed by the court, as long as any extension is granted within the original seven-day period. Fed. R. Crim. Pro. 33(b)(2). Motions that purport to rely on newly discovered evidence may be filed up to three years after the verdict. Fed. R. Crim. Pro. 33(b)(1). The filing requirements in Rule 33 are jurisdictional. *United States v. Bramlett,* 116 F.3d 1403, 1405 (11th Cir. 1997); *United States v. DiBernardo,* 880 F.2d 1216, 1223 (11th Cir. 1989); *United States v. Hall,* 854 F.2d 1269, 1272 (11th Cir. 1988). Consequently, the Court must address its jurisdiction with respect to each of Defendant's motions.

JURISDICTION

The Court has jurisdiction to consider Motion One and Motion Two for the following reasons. Defendant's trial concluded on March 13, 2003, but Motion One, which is based solely on non-newly discovered evidence, was not filed until May 23, 2003 – more than two months after the verdict. While this filing was well beyond the seven-day window mandated by Rule 33, jurisdiction is proper in this Court because during the first seven days Defendant was granted a filing extension until May 23, 2003.[1] Rule 33 expressly recognizes a court's authority to extend the time for filing. Fed. R. Crim. Pro. 33(6)(2). With respect to Motion Two, filed on June 23, 2003, the Court's jurisdiction is proper because that motion relies exclusively on newly discovered evidence and was filed within the three-year period permitted by Rule 33.

However, the Court does not have jurisdiction to consider Defendant's Amendment to Motion One. The Amendment was filed with the Court on June 13, 2003 – three weeks after the May 23 deadline imposed by the Court for filing new trial motions. Jurisdiction would have been proper if Defendant had asserted the existence of newly discovered evidence in support of his Amendment. But Defendant has not done so and, as a result, cannot take advantage of the three year filing period set forth in Rule 33. Alternatively, jurisdiction would have been proper

[1] Defendant originally moved the Court, within seven days of the verdict, to extend the filing deadline until April 23, 2003 due to a delay in receiving the trial transcripts. After the Court granted Defendant's motion, further delays in connection with the transcripts caused Defendant to move for another extension of time. The Court granted Defendant's second motion and extended the filing deadline until May 23, 2003.

if the Amendment was filed within the extension period granted by the Court. Because it was not filed within that period, the Court is without jurisdiction to consider its merits. *DiBernardo,* 880 F.2d at 1223 (noting the district court's lack of jurisdiction over a motion based on non-newly discovered evidence and filed outside of the seven day filing period prescribed by Rule 33). Defendant's Amendment to Motion One is hereby dismissed for lack of jurisdiction.

A. MOTION ONE

With respect to the merits of Defendant's Motion One, the "interests of justice" standard contained in Rule 33 will guide the Court in its determination, as this motion was filed within the period expressly permitted by the Court. *See United States v. Hall,* 854 F.2d 1269, 1270-71 (11th Cir, 1988) (recognizing that the interests of justice standard permits wide discretion in a court's consideration of motions filed within either the initial seven days or any court extended period prescribed by Rule 33). For the reasons set forth more fully below, the Court hereby denies Defendant's Motion One in its entirety.

1. Ineffective Assistance of Counsel

The United States Supreme Court has articulated a two-prong test for ineffective assistance claims, both of which a defendant must satisfy in order to prevail. *See Strickland v. Washington,* 466 U.S. 668 (1984). First, a defendant must show that his counsel's performance was deficient. *Id.* at 687. In order to establish deficient performance, it must be demonstrated that counsel's representation at trial "fell below an objective standard of

reasonableness," *Id.* at 688. Second, a defendant must show that he incurred prejudice as a result of counsel's performance. *Id.* at 687. To demonstrate that prejudice resulted as a consequence of counsel's conduct at trial, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court has construed "reasonable probability" to mean one which would undermine confidence in the trial's outcome. *Id.*

First, Defendant argues that his counsel's failure to interview any of the government's witnesses or otherwise make adequate investigations before the commencement of the trial constituted objectively unreasonable behavior. (Def.'s Mot. for New Trial at 1; Def.'s Reply Br. to Pl.'s Resp. to Def.'s Mot. for New Trial at 2-4.) As noted by the Eleventh Circuit, "the adequacy of a pretrial investigation turns on the complexity of the case and trial strategy." *Code v. Montgomery,* 799 F.2d 1481, 1483 (11th Cir. 1986), There is no per se rule that applies to claims of inadequate trial preparation, primarily because every trial inevitably requires attorneys to make subjective judgments about the best course of action for their clients. Even if the Court assumes for the sake of argument that counsel's decision not to interview the government's witnesses or make pretrial investigations was objectively unreasonable, Defendant has failed to demonstrate that counsel would have been able to elicit responses in a pretrial interview that he was unable to on cross-examination, Defendant also fails to show any alternative theory of the case that might have been uncovered by further investigation. *See McKleskey v. Kemp*, 753 F.2d 877, 900 (11th Cir. 1985) (noting that "a court may decide an ineffectiveness claim

on the ground of lack of prejudice without considering the reasonableness of the attorney's performance"). In *McKleskey,* where the defendant similarly challenged his attorney's pretrial preparations, the United States Court of Appeals for the Eleventh Circuit found that the defendant was not prejudiced by his attorney's failure to take depositions of the state's witnesses. *Id.* Because it is clear to the Court that counsel's failure to interview the government's witnesses or explore alternative defense theories[2] did not result in prejudice to Defendant or in any way undermine the result of the trial, Defendant's Motion is denied with respect to these assertions.

Second, Defendant argues that his counsel performed deficiently by failing to present witnesses other than general character witness. (Def.'s Mot. for New Trial at 1, 4.) Again, the discretion to determine which witnesses, if any, to call to the stand is properly left to trial counsel, Further, nowhere does Defendant suggest any specific witnesses that might have been called or explain how they would have added any testimony beneficial to the defense. *See Moss v. Hofbauer,* 286 F.3d 851 (6th Cir. 2002) (rejecting defendant's argument that his counsel performed

[2] Defendant makes a vague assertion in his brief to the Court that there may have been another theory of the case, which defense counsel did not pursue, saying, "[counsel] also made a unilateral decision to abandon the main defense that he and the Defendant had agreed to prior to trial" (D. 48 at 7.) However, Defendant fails to demonstrate to the Court any other sound theory counsel may have advanced. As the United States Supreme Court has noted, "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and *may disserve the interests of his client by attempting a useless charade" United States v. Cronic,* 466 U.S. 648, 656 n.19 (1984) (emphasis added).

ineffectively by not calling any defense witnesses because defendant failed to offer any potential witnesses that should have been called); *see United States v. Murray*, 751 F.3d 1528 (9th Cir. 1985) (holding that counsel's decision not to call any defense witnesses "appear[ed] to fall within the wide range of reasonable professional representation"). For these reasons, counsel's decisions concerning which witnesses to call were not objectively unreasonable, and consequently, Defendant has not made out a claim for ineffective assistance.

Third, Defendant argues that his counsel offered ineffective assistance by failing "to gain an understanding of substantive provisions of the law concerning tax crimes." (Def.'s Mot. for New Trial at 1.) However, Defendant makes only one challenge to counsel's allegedly insufficient knowledge of tax law. Defendant asserts that counsel was "completely unaware of the argument concerning the expiration of the statute of limitations for the 1994 tax year" (Def.'s Mot. for New Trial at 6) and could cite no authority for his position at trial (Def.'s Mot. for New Trial at 6). This accusation is simply not born out by the trial transcript. For instance, at trial when Defendant's counsel moved for judgment of acquittal, he based his argument on the fact that in his view, the six-year statute of limitation governing willful tax evasion under 26 U.S.C. § 7201 began to run on the date the tax was due and owing. Under this interpretation, the government's case would have been barred by limitations. Counsel cited 26 U.S.C. § 6531[3] as support for his position, and weighing

[3] The trial transcript reveals that counsel actually referred to § 6513 but, after inquiry by the Court, responded that he would have to check on the specific code section. Reviewing the two tax code provisions

(Continued on following page)

the persuasiveness of this argument is not an exercise for the Court in the context of determining whether he rendered adequate legal service to his client. It is sufficient to say that his knowledge of the applicable law was not objectively below what this Court would expect of a reasonably competent attorney. Further, Defendant has failed again to show how this minor disagreement with his trial counsel's presentation has in any way undermined the outcome of the trial. For these reasons, Defendant's allegation of ineffective assistance based on lack of knowledge of the substantive provisions of the tax code is without merit.

Next, Defendant argues that his counsel's failure to properly impeach or effectively cross-examine the government's witnesses at trial constitutes objectively unreasonable performance under *Strickland's* first prong. (Def.'s Reply Br. to Pl.'s Resp. to Def.'s Mot. for New Trial at 3.) Although Defendant's brief suggests several ways in which the government's witnesses may have been cross-examined differently (Def.'s Mot. for New Trial at 4-5), second-guessing counsel's litigation tactics is not within the province of the Court. Furthermore, Defendant's argument is unpersuasive because, as the United States Court of Appeals for the Eleventh Circuit has noted, courts should not be in the business of "grading lawyers' performances," but instead should be concerned only with determining "whether the adversarial process at trial, in

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at issue here (§6513 and §6531), it seems apparent to the Court that counsel was relying on § 6531, because this is the only one of the two provisions dealing with limitations periods for tax evasion. Counsel simply misspoke in his argument to the Court, and for Defendant to suggest that this is evidence of counsel's inadequate performance is at best dubious and unpersuasive.

fact, worked adequately." *White v. Singletary,* 972 F.2d 1218, 1221 (11th Cir. 1992). Since courts are advised to indulge a strong measure of deference when reviewing an attorney's trial performance, *Strickland,* 466 U.S. at 689, the Court must guard against "second guessing with the benefit of hindsight." *White,* 972 F.2d at 1220. With respect to these assertions, the Court concludes that counsel's performance was objectively reasonable and, therefore, finds no reason to discuss the prejudice prong of the *Strickland* test.

Finally, Defendant asserts that his counsel performed inadequately by not presenting a good faith defense to the jury. A defendant's good faith belief, whether objectively reasonable or not, that he is not liable for taxes under the tax laws will negate any charge by the government that such defendant willfully evaded paying taxes. *See Cheek v. U.S.,* 498 U.S. 192 (1991). While reviewing the jury charges with the attorneys for the government and the defense, the Court pointed out that a good faith charge is inappropriate where no evidence is presented at trial to support such a charge. (Tr. Vol. III at 130.) Defendant's counsel agreed with the court that the jury could not presume Defendant's good faith from the testimony of other witnesses. (Tr. Vol. III at 130.) Here, Defendant attacks his counsel's decision not to build a good faith defense into his theory of the case. Besides one conclusory sentence in which Defendant asserts that "[t]here was oral and documentary evidence that should have been presented concerning good faith that was discussed and prepared but never introduced," there is nothing in the record to indicate specifically what that evidence may have been or how it might have made a difference in the outcome of the trial. Despite Defendant's bald assertions,

the Court refuses to find that counsel's decision not to present a good faith defense was unreasonable, where no evidence has been provided to support such an argument. After all, the burden to overcome the presumption that counsel has performed effectively rests with the defendant. *Mills v. Singletary,* 63 F.3d 999, 1020 (11th Cir. 1995). Therefore, the Court concludes that counsel's decision not to present a good faith defense was not objectively unreasonable and, therefore, denies Defendant's motion on this ground.

2. Statute of Limitations

Defendant argues he is entitled to a new trial because "the Court erred in ruling that the statute of limitations had expired with respect to the 1994 tax year." (Def.'s Mot. for New Trial at 1.) It should be noted at the outset that the jury in its role as fact-finder, not the Court as erroneously asserted by Defendant, found that the limitation on the 1994 tax evasion count had not expired before the indictment was returned. As indicated by the trial transcript, the Court charged the jury on the law governing the statute of limitations in tax evasion cases (Tr. Vol. IV at 43) and left the factual issue to the jury for determination.

Section 6531 of Title 26 of the United States Code prescribes a six-year period of limitation for criminal prosecutions involving a charge of willfully attempting to evade taxes. 26 U.S.C.A. § 6531 (2002). As noted previously, Defendant in this case was convicted of violating 26 U.S.C. § 7201, which expressly prohibits any willful attempt to evade taxes. Therefore, the six-year limitation period is applicable here. The law in the Eleventh Circuit is clear that in tax evasion cases the limitation period does

not begin to run until the last affirmative act of evasion. *United States v. Hunerlach,* 197 F.3d 1059, 1065 (11th Cir. 1999). Defendant attempts to distinguish *Hunerlach* from this case on the basis that the defendant in *Hunerlach* deposited monies into offshore bank accounts, whereas here Defendant deposited income from his business in banks located in his own hometown. This factual distinction, however, is unavailing because it has no relevance to the issue of when the limitation period begins to run.

At trial, the government presented substantial evidence that income generated from Defendant's medical practice was deposited into bank accounts unknown to Defendant's accountant from 1994 through May 2, 1996. (Tr. Vol. III at 32-34, 42-43.) These numerous bank deposits constituted affirmative acts of evasion because, as credible evidence demonstrated at trial, Defendant was aware that his accountant used his bank statements to prepare the yearly income tax statements for his medical practice (Tr. Vol. I at 155) and was also aware that his accountant had no knowledge of the deposits to these various bank accounts (Tr. Vol. II at 44-45, 51).

To illustrate the congressional concept of willful evasion, the United States Supreme Court has held that affirmative acts of evasion can be inferred from "any conduct, the likely effect of which would be to mislead or to conceal." *Spies v. United States,* 317 U.S. 492, 499 (1943). The transcript reveals that sufficient evidence was adduced at trial for the jury to conclude that Defendant's actions constituted affirmative acts of evasion. Further, because the indictment was returned against Defendant on May 2, 2002, and the jury found that Defendant engaged in affirmative acts of evasion after May 2, 1996, the six year period of limitation did not expire before the

indictment was returned. Therefore, Defendant's statute of limitation argument with respect to the 1994 tax evasion count is without merit and does not require that Defendant receive a new trial in the interest of justice.

3. Insufficiency of the Evidence

In reviewing a new trial motion that challenges the sufficiency of the evidence, courts must ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Tarkoff,* 242 F.3d 991, 993 (11th Cir. 2001) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)) (emphasis in original). Defendant in this case was found guilty of willfully attempting to evade payment of taxes under 26 U.S.C. § 7201. The essential elements of that offense are: (1) willfulness, (2) the existence of a tax deficiency, and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *United States v. Edwards,* 777 F.2d 644, 650 (11th Cir. 1985). Here, Defendant argues that the government failed to prove the third element beyond a reasonable doubt. More specifically, Defendant argues that because he remained silent about the deposits into his various bank accounts, he made no affirmative act. (Def.'s Mot. for New Trial at 8.) In other words, according to this argument, failure to alert his accountant about his other bank accounts amounted to an omission, not an affirmative act. However, as noted above, an affirmative act can be inferred from any conduct having the tendency to mislead or conceal. *Spies,* 317 U.S. at 499. Defendant's failure to notify his accountant resulted in the concealment of large amounts of income, therefore, constituting an affirmative act. After reviewing the trial transcript,

the Court is convinced that a rational fact-finder could have found that the government established this element of the crime beyond a reasonable doubt. Therefore, Defendant's insufficiency of the evidence claim is without merit.

4. Improper Jury Charge

At the conclusion of the trial, the Court included in the jury charge an instruction regarding a method of proof sometimes used by the government to prove tax evasion known as the "bank deposit" method of proof. (Tr. Vol. IV at 47-49.) However, the Court recognized after the government objected to this particular charge that, due to some confusion in terminology, it had improperly charged the jury. The Court subsequently recharged the jury, instructing the jurors to disregard the previous charge concerning the bank deposit method of proof. The Defendant now argues in his new trial motion that the Court erred in recharging the jury with respect to the bank deposit method of proof.

In prosecuting a defendant for tax evasion, there are two methods of proof upon which the government can rely. *See United States v. Black,* 843 F.2d 1456 (D.C. Cir. 1988). The government may prove its case by introducing specific items – e.g. bank records, checks, etc. – that demonstrate "the receipt of . . . reportable income by the defendant that do not appear on his income tax return." *Id.* at 1458. This is known as the "specific items" method of proof. Alternatively, if specific items are unavailable, the government may rely on an indirect method known as the "bank deposit" method of proof. Rather than using direct evidence, this method relies on an inference that a taxpayer has unreported income, which arises from an "increase[]

in net worth, increases in bank deposits, or the presence of cash expenditures." *Id.*

In this case, the government chose to prove its case against Defendant by using the "specific items" method of proof. By introducing evidence in the form of tax returns, checks, and bank records, the government did not have to rely on an inference that the Defendant earned more money than what was reflected on his income tax returns. The confusion that resulted in the Court's erroneous jury charge stemmed from the accounting method by which Defendant's accountants prepared his income taxes. Defendant's accountants determined his yearly income tax by examining the records of his known bank accounts during a given taxable year. (Tr. Vol. I at 153, 155; Vol. II at 13, 28, 30, 34, 37, 71-72, 74.) This accounting method, frequently used for small businesses, is referred to as the bank deposit method of income recognition. The government correctly pointed out in its brief that the bank deposit method of proof is a legal term of art completely unrelated to the similarly named bank deposit method of income recognition. (Gov't. Resp. to Def.'s Mot. for New Trial at 22.)

Since the prosecution relied on the "specific items" method of proof, the Court correctly instructed the jury to disregard the charge relating to the "bank deposit" method. Therefore, Defendant's argument is without merit.

5. Good Faith Defense

Finally, Defendant argues that justice requires a new trial because the Court erred in not instructing the jury with respect to a good faith defense. After reviewing the

trial transcript, the Court is of the opinion that no good faith charge was warranted. Therefore, Defendant's motion is hereby denied with regard to this assertion.

B. MOTION TWO

Defendant contends in Motion Two that he is entitled to a new trial based upon the discovery of new evidence. Courts have been urged to exercise great caution when considering the merits of a new trial motion filed outside of the seven-day time period specifically prescribed by Rule 33. *See United States v. Halt,* 854 F.2d 1269, 1270-71 (11th Cir. 1988); *see also United States v. Garner,* 529 F.2d 962, 969 (6th Cir. 1976). The result is that a district court's broad discretion to grant a new trial is significantly limited when a motion is predicated on newly discovered evidence, which is the only basis that will support a motion filed outside of the seven-day filing period. Fed. R. Crim. Pro. 33(b)(1).

The United States Court of Appeals for the Eleventh Circuit has consistently applied a five-part test to new trial motions purporting to rely on newly discovered evidence. Only by satisfying the following five requirements may a defendant establish that evidence is newly discovered for purposes of Rule 33:

> (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

United States v. Schlei, 122 F.3d 944, 991 (11th Cir. 1997); *see also United States v. Ramos,* 179 F.3d 1333, 1336 n.1 (11th Cir. 1999); *United States v. Fernandez,* 136 F.3d 1434, 1438 (11th Cir. 1998). Stated differently, "the failure to satisfy any one of these elements is fatal to a motion for a new trial." *United States v. Lee,* 68 F.3d 1267, 1274 (11th Cir. 1995).

In this case, Defendant asserts that in the time since the trial's conclusion he has come into possession of certain cancelled checks received by Defendant's sister from a bank account that, according to Defendant, the government argued his sister did not know about. (Def's Mot. for New Trial Based on New Evidence at 1.) Defendant argues that because Ms. Geter in fact knew about this bank account, the conviction was not warranted and that the existence of these checks, if a new trial were granted, would produce an acquittal. However, after partially reciting the applicable test used in the Eleventh Circuit for new trial motions based on newly discovered evidence, Defendant utterly fails to demonstrate how the second, fourth, or fifth elements are satisfied. Mechanically reciting a legal standard, without incorporating specific facts to show how each element is met, is plainly insufficient to justify a new trial. Since Defendant has failed to show that the cancelled checks are newly discovered evidence under Rule 33, the Court hereby denies Motion Two.

CONCLUSION

For the foregoing reasons, the Court hereby denies both of Defendant's motions for new trial.

SO ORDERED, this the 28 day of July, 2003.

/s/ Hugh Lawson
HUGH LAWSON, JUDGE

sew

UNITED STATES DISTRICT COURT
Middle District of Georgia

IN THE MATTER OF — No. 3:02-cr-00014

USA – plaintiff

v.

Brown – defendant

Doc. ID No.:

CERTIFICATE OF SERVICE

This is to certify that I have on this date mailed a copy of the attached document to:

Jennifer Peru Burnett, Esq.
600 E Street, NW
Washington, DC 20004

Glenn A. Makl, Esq.
600 E. Street, N.W.
Room 5808
Washington, DC 20004

Ceasar D. Richbow, Esq.
155 Bradford Square
Fayetteville, GA 30215

Dated: July 29, 2003

Gregory J. Leonard, CLERK
By

/s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT

(Filed June 3, 2003)

Middle District of Georgia

UNITED STATES OF AMERICA
V.
Bradford G. Brown

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
3:02-CR-00014-001-HL

Ceasar D. Richbow
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 2 & 3 after a plea of not guilty. ACCORDINGLY, the court has adjudicated the defendant guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:7201	Tax Evasion	04/15/95	2
26:7201	Tax Evasion	04/15/96	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Counts(s) 1 X is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: XXX-XX-2235

Defendant's DOB: 07/11/1950

Defendant's USM: 91022-020

Defendant's Residence Address: 328 Parkway Drive, Sparta GA 31087

Defendant's Mailing Address: same as above

May 29, 2003
Date of Imposition of Judgment

/s/ Hugh Lawson
Signature of Judicial Officer

Hugh Lawson, Judge
Name and Title of Judicial Officer

June 3, 2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 41 months on each count to run concurrently, for a total imprisonment of 41 months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:
☐ at _____ ☐ a☐ p.m. on _____.

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

X as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

You are prohibited from incurring new credit charges, disposing/transferring/encumbering of any assets owned by you or any corporation, or business owned by you or here and thereafter that you have a controlling interest, or opening additional lines of credit without approval of the U.S. Probation Office, unless you are in compliance with the payment schedule.

You shall provide financial information to the Probation Officer upon request.

You shall provide complete, candid, and truthful cooperation and assistance to the Internal Revenue Service in determining and paying your tax liability.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 40,000.00	$ 3,083,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Internal Revenue Service Attn: Gloria Jackson P.O. Box 47-422 No. 75B Doraville, GA 30362	$3,083,000.00	$3,083,000.00	
TOTALS	$3,083,000.00	$3,083,000.00	

☐ If applicable, restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution. ☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of loses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The total amount of loss/restitution includes ($1,561,400.00 in tax loss and $1,521,600.00 in interest and penalties for a total of $3,083,000.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B X Payment to begin immediately (may be combined with ☐ C, X D, or ☐ E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D X Payment in monthly (e.g., equal, weekly, monthly, quarterly) installments of $ 86,750.00 over a period of 36 months (e.g., months or years), to commence 60 (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

2006 WL 1735707

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

BRADFORD G. BROWN,	* CASE NO.	3:05-CV-38 (HL)
Petitioner,	*	28 U.S.C. § 2255
	* CASE NO.	3:02-CR-14 (HL)
VS.	*	
UNITED STATES OF AMERICA,	*	
Respondent.	*	

ORDER DENYING COA

(Filed June 23, 2006)

Petitioner Brown filed a Notice of Appeal (Document-97) from the Judgment of this court denying his Motion To Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255. (Documents-95, 96). His Notice of Appeal failed to raise any specific issue or issues he wished to have reviewed, nor did he file an Application For Certificate of Appealability specifying issues for review. However, "If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Fed.R.App.P. 22(b). Therefore, a Notice of Appeal must be treated as if accompanied by an Application for Certificate of Appeal by the District Court.

Petitioner Brown raised six issues in his Motion To Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 to all of which the Magistrate Judge recommended denial. (Document-85). Petitioner filed objections,

however, to only the recommendations as to his Grounds One, Two, and Three. In making a decision as to whether to grant a COA, the court should "conduct a threshold inquiry consisting of an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029 (2003). To obtain a COA, the Applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, he must demonstrate that "jurists of reason could disagree with the district court's resolution or his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Petitioner Brown first contented that he suffered a procedural due process violation as the result of an alleged *Brady* (*v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197-98 (1963)) violation. As demonstrated fully in this court's Order denying Petitioner's § 2255 Motion, Petitioner Brown failed to meet the well-settled standards set out in *Stickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999), *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989), and the decisions of other Circuit Courts cited. Petitioner Brown failed to establish that he did not already possess, or that he could have readily procured through reasonable diligence the source documents allegedly withheld by the Government, or that such documents were in fact suppressed by the Government. Having failed to meet his burden in this well-settled area of law, Petitioner is not entitled to a COA on his *Brady* claim.

For the same reason, Petitioner's claim of ineffective assistance of counsel for failure to object to the Government's alleged *Brady* violation, fails for Petitioner's failure to

demonstrate that there was any viable issue as to a *Brady* violation.

Petitioner's only remaining argument is that assuming that the Government had produced the allegedly withheld source documents, Petitioner's trial and appellate counsel would have been ineffective for not incorporating the documents into a defense for him. The circuity of this argument is obvious and of no merit in consideration of Petitioner's failure to make a prima facie showing that there ever was a *Brady* violation at all.

Petitioner Brown has made no substantial showing of the denial of a constitutional right/due process violation that is not well-settled contrary to his contentions by pre-existing law. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029 (2003).

WHEREFORE, Petitioner Williams' Application For Certificate of Appealability is DENIED.

SO ORDERED, this 23rd day of June 2006.

s/ Hugh Lawson
HUGH LAWSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

BRADFORD G. BROWN,	*	
Petitioner,	*	
VS.	*	CASE NO. 3:02-CR-14 (HL)
UNITED STATES OF AMERICA,	*	Civil Case No. 3:05-CV-38
Respondent.	*	

REPORT AND RECOMMENDATION

(Filed November 10, 2005)

Before the court is Petitioner Brown's Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255, filed on May 19, 2005.

On May 2, 2002, an indictment was returned in this court against Petitioner Bradford G. Brown charging him with Tax Evasion for calendar year 1993 (Count I), Tax Evasion for calendar year 1994 (Count II) and Tax Evasion for calendar year 1995 (Count III). (R-1), On March 10, 2003, before Petitioner's trial began, the District Court granted the Government's oral motion to dismiss Count One. (R-82). Petitioner Brown proceeded to trial and was convicted by a jury on Counts Two and Three on March 13, 2003. (R-37). On May 29, 2003, Petitioner was sentenced to forty-one months imprisonment for Count II, a concurrent term of forty-one months imprisonment for Count III, ordered to pay restitution and fined. (R-52).

On May 19, 2005, Petitioner Brown filed his present Motion To Vacate, Set Aside, or Correct his Sentence

Pursuant to 28 U.S.C. § 2255. The Government filed its Answer in Opposition to Petitioner's Motion to Vacate on July 28, 2005. Thereafter, Petitioner filed a Reply to the Government's Response on August 30, 2005, which was also considered by this Court.

Petitioner's § 2255 Motion

In his Motion To Vacate, Set Aside, or Correct his Sentence, Petitioner Brown alleges six grounds for relief. In **Ground One,** which has four sub-parts, the Petitioner argues that the government violated his right to procedural due process by failing to remit materials used by Agent Neal in conducting an audit of Petitioner's Accounts. In **Grounds Two** and **Three**, Petitioner argues that his counsel rendered ineffective assistance when counsel failed to raise the issue of the Government's failure to provide the audit materials to Petitioner as requested. In **Ground Four**, Petitioner argues that the Government violated his rights under the Fifth and Sixth Amendments to The Constitution by prosecuting him for a crime alleged to have been committed beyond the statute of limitations. **Ground Five** asserts that Petitioner's rights to due process of the law and trial by a fair and impartial jury were compromised when the District Court allowed the jury to deliberate prior to the close of evidence. In **Ground Six**, Petitioner argues that both his trial and appellate counsel rendered ineffective assistance of counsel when they failed to raise the issue of the jury's misconduct to the District and Appellate courts.

I. "Law of the Case" Rule

In his Motion, before stating his grounds, Petitioner first argues that he has complied with the procedural requirements of a § 2255 filing. Petitioner then proceeds to summarize the "law of the case" rule in § 2255 jurisprudence and attempts to carve out an exception. Under the law of the case rule, the district court is not required to reconsider claims of error that were raised and disposed of on direct appeal. *United States v. Rowan*, 633 F. 2d 1034, 1035 (11th Cir. 1981). "Once a matter has been decided adversely to a defendant on direct appeal it cannot be relitigated in a collateral attack under § 2255." *United States v. Natelli*, 553 F. 2d 5, 7 (2d Cir. 1977). A rejected claim does not merit rehearing on a mere *re-characterization* of the prior claim, or on a different, but previously available legal theory. *Cook v. Lockhart*, 878 F. 2d 220, 222 (8th Cir. 1989). *See also United States v. Nyhuis*, 211 F.3d 1340 (11th Cir. 2000).

Although the issue[1] in **Ground Four** was raised and ruled on upon Petitioner's direct appeal claims, Petitioner argues that the law of the case rule does not apply. Petitioner attempts to distinguish his case by citing *Davis v. United States*, which grants an exception when a Petitioner has persisted with his claim but lost, and then the law of the Circuit changes. 417 U.S. 333, 343, 94 S.Ct.

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[1] In his direct appeal, Petitioner argued that the District Court erred in denying his Motion to Dismiss based on the running of the statute of limitations. Here, Petitioner claims that the Government violated his Fifth and Sixth Amendment rights by prosecuting him for a crime outside the statute of limitations. To the extent that this issue was resolved on direct appeal, it is addressed under the "rule of the case" law. To the extent that Ground Four raises a new issue, it will be addressed below under procedural default.

2298, 41 L.Ed.2d 4109 (1974), Petitioner argues that his exception stems from the change in law created by the holdings in *United States v. Booker* and *Blakely v. Washington. Booker,* 543 U.S. ___, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) and *Blakely*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). It should first be noted that any claims the Petitioner might have regarding the *Booker* and *Blakely* holdings must fail. Petitioner Brown was sentenced on May 29, 2003, and *Booker* was not decided until January 12, 2005. Therefore, his sentence could not have violated the *Booker* ruling that the U.S. Sentencing Guidelines were advisory only. Additionally, our Circuit Court of Appeals has specifically held, as indicated by the *Booker* Court itself, that the Supreme Court's holding does not apply to cases on collateral review, but only to cases not yet final.

In re: Jerry J. Anderson, 396 F.3d 1336 (11th Cir. 2005), the Eleventh Circuit Court of Appeals held:

> Regardless of whether *Booker* established a "new rule of constitutional law" within the meaning of §§ 2244(b)(2)(A) and 2255, the Supreme Court has not expressly declared *Booker* to be retroactive to cases on collateral review. *See Booker*, 125 S.Ct. at ___ (opinion of Breyer, J.) (expressly extending the holding "to all cases on direct review"). Put simply, *Booker* itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review. . . . Indeed, as we noted in *In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004), the Supreme Court has indicated the very opposite:
>
> > [T]he Supreme Court has strongly implied that *Blakely* is not to be applied

> retroactively. The same day the Supreme Court decided *Blakely*, the Court also issued its decision in *Schriro v. Summerlin*, ___ U.S. ___ 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), holding that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which extended application of *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review. *Summerlin*, 124 S.Ct. at 2526; *see also Blakely*, 124 S.Ct. at 2548-49 (O'Connor, J,, dissenting) (recognizing the Court's holding in *Summerlin* "that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review"); *see also McCoy v. United States,* 266 F.3d 1245, 1256-58 (11th Cir. 2001) (holding that *Apprendi* is not retroactive to cases on collateral review). . . . It follows that because *Booker*, like *Blakely* and *Ring,* is based on an extension of *Apprendi,* Anderson cannot show that the Supreme Court has made that decision retroactive to cases already *final* on direct review.

See also Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005) ("as the Supreme Court concluded in *Schriro*, we conclude that *Booker's* constitutional rule falls squarely under the category of new rules of criminal procedure that do not apply retroactively to § 2255 cases on collateral review"). Petitioner Brown's reliance on the *Booker* holding, therefore, is misplaced and needs no further discussion. However, even if *Booker* were retroactive, in this instance it still would not qualify as an "intervening

change in law" necessary to invoke *Davis* and circumvent the law of the case rule. The "intervening change in law" must, at the very least, be applicable to Petitioner's case. The holding in *Booker* speaks directly to facts used to increase a sentence above the guideline range, not to jurisdictional issues such as the statute of limitations, which concern the actual conviction. In a round-about way, Petitioner claims that his sentence was increased because he was convicted on charges which fell outside the statute of limitations and that this increasing factor should have been decided by the jury. Petitioner, however, does not argue that his sentence was increased outside the guideline sentencing range. Petitioner's attempt to stretch *Booker* to fit his factual circumstance falls flat. Prior to trial and twice during the trial, Judge Lawson entertained two motions made by Petitioner for acquittal based on the statute of limitations issues raised herein, and all were denied. (Trial Tr. vol. 4, pp. 89-97 and 114, March 12, 2003). Furthermore, the issue of continuing evasive measures, which tolls the statute of limitations, was presented to the jury for determination at trial. (Trial Transcript, Vol. 4, pp. 9, 24, 28-29, 32-43, 45-47, 53-57, 64-68, 76-78, 81-82, 84, March 12, 2003). The jury was charged by the court on said issue and found against the defendant. (Trial Transcript, Vol. 5, pp. 43, and 63, March 13, 2003). Despite the lack of application due to retroactivity, the "factual issue" Petitioner argues was used to increase his sentence was presented to the jury, taking the wind out of any sail Petitioner believes *Booker* might have created.

Therefore, Petitioner's attempt to circumvent the "law of the case" rule is wholly without merit and further

examination of any issue raised in and ruled upon by the Court of Appeals is unnecessary.

II. Procedural Default

Petitioner is procedurally barred from raising any issue that could have been raised on appeal but was not. **Ground One** states that the Government violated Petitioner's right to procedural due process by failing to produce all exculpatory evidence and failing to remit materials used Agent Neal in conducting an audit of Petitioner's accounts. In **Ground Four**, Petitioner argues that the Government violated his Fifth and Sixth Amendment rights by prosecuting him for a crime which fell outside the statute of limitations. To the extent that this ground raises a new issue, Petitioner is procedurally barred from raising this issue. In **Ground Five**, Petitioner claims that his right to due process of law and trial by a fair and impartial jury were compromised when the District Court allowed the jury to deliberate trial evidence prior to the close of evidence.

Petitioner's convictions and sentence were affirmed by the Eleventh Circuit Court of Appeals on Petitioner's direct appeal. Petitioner did not raise before the Court of Appeals his present contentions in **Grounds One, Four and Five.** He is therefore procedurally barred from raising those claims now in his § 2255 Motion. In *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1999), the Court held, "Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding." See *Cross v. United States*, 893 F. 2d 1287, 1289 (11th Cir.), cert. denied, 498 U.S. 849,

111 S. Ct. 138, (1990) (When a defendant fails to pursue an available issue on direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the error.)

Petitioner Brown has failed to show or even allege any cause for his failure to raise **Ground One** on direct appeal. The issues of exculpatory and audit materials are, however, further explored in Grounds Two and Three below. Furthermore, some of the sub-parts in **Ground One** that were argued by Petitioner relate directly to sufficiency of the evidence, which was directly appealed and ruled upon by The Eleventh Circuit Court of Appeals. Petitioner Brown makes suppositions but cannot show actual prejudice.

In his direct appeal, Petitioner claimed that the District Court erred when it failed to dismiss the charges against him based on the running of the statute of limitations. In **Ground Four**, Petitioner now argues that the Government violated Petitioner's rights by prosecuting him outside the statute of limitations. As previously stated, the Supreme Court of the United States and The Eleventh Circuit Court of Appeals have explicitly found that *Booker* and *Blakely* do not apply retroactively to §2255 cases on collateral review. Furthermore, the series of cases that Petitioner alleges creates his exception via *Davis*, deal with **sentencing** and facts which increase the punishment outside the statutory and/or guideline maximum. Petitioner, however, argues to the court that these cases should apply to the case at bar and that any fact which is necessary to **convict** a defendant be charged in the indictment, This argument is completely without merit.

Rule 7(c) of the Rule of Criminal Procedure governs the nature and contents of an indictment, requiring only that:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation or other provision of law that the defendant is alleged to have violated. . . .

FED. R CRIM.P. 7(c). Nothing in the rule requires that an indictment contain a statement as to the statute of limitations. Title 26 of the United States Code Annotated, Section 7201, makes attempting "to evade or defeat any tax imposed by said title or payment thereof" a felony offense. Title 26 of the United States Code Annotated, Section 6531(2), extends the statute of limitations to six years for said offense. In *United States v. Hunerlach*, a similar tax evasion case in which the defendant hid income from the government, The Eleventh Circuit Court of Appeals held that " . . . the statute of limitation for willful evasion of *payment* also begins to run from the last affirmative act of evasion, even if the act occurs past six years from the date which the tax is due." *United States v. Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999). In Petitioner's case, the Government presented evidence that

Petitioner had both concealed his income and given false statements to an IRS agent during the six years preceding his indictment. (Trial Transcript, Vol. III, pp. 97-99, 116-120, 163, 172, and 189; Vol. IV, pp. 42-43, and 62-64). In *Hunerlach*, the court found that hiding income was an affirmative act under §7201 and that a "[defendant's] false statements to [an] IRS agent [] regarding his assets can constitute an affirmative act of evasion which can sustain a conviction under §7201." *Hunerlach*, 197 at 1065 and 1067.

The United States Supreme Court set forth the test to determine the adequacy of an indictment in *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). *Hamling* states:

> [A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Additionally an indictment that adheres to the language of the statute is generally sufficient so long as the indictment sets forth the essential elements of the crime.

United States v. Edwards, 777 F.2d 644, 650 (11th Cir. 1985); citing *Hamling*, 418 U.S. at 117, 94 S. Ct. at 2907; *United States v. Harrell*, 737 F.2d 971, 975 (11th Cir. 1984), *cert. denied*, 470 U.S. 1027, 105 S.Ct. 1392, 84 L.Ed.2d 781 (Sup.Ct. 1985); *United States v. Ramos*, 666 F.2d 469, 474 (11th Cir. 1982). Specifically as to tax evasion cases arising under 26 U.S.C.A. §7201, The Supreme Court found that "[t]he essential elements that must be established to prove a violation of §7201 are willfulness,

the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax." *Edwards*, 777 at 650; citing *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965). The language in Counts II and III tracked the language of the statute. Furthermore, although the Government did not use the term "tolling of the statute of limitations" in the indictment, the Government did allege the facts which tolled the statute of limitations in Counts Two and Three of the indictment. (R-1). Not only did Petitioner have adequate notice of the offense charged, but he also had the information he needed to file a motion for an acquittal based on the allegations in the indictment. Thus, the indictment was sufficient.

Although Petitioner provides a lengthy argument as to why *Booker* and *Blakely* should apply to his case, he fails to even allege cause for his failure to raise this ground on direct appeal. As previously stated, Petitioner is required to show both cause and actual prejudice to overcome a procedural default. Here Petitioner has failed to show cause and thus an examination of actual prejudice is unnecessary.

In **Ground Five**, Petitioner claims that his rights to due process and trial by a fair and impartial jury were compromised when the District Court let the jury deliberate prior to the close of evidence. Once again, Petitioner has failed to show any cause for his failure to raise this claim on direct appeal. Furthermore, Petitioner has failed to show that the District Court's erred in any way. Petitioner did not object to the jury's question at trial nor claim at that time that the jury was prematurely deliberating, "The district court has discretion to determine whether evidence of premature deliberation warrants an

evidentiary hearing." *United States v. Cuthel*, 903 F.2d 1381, 1381 (11th Cir. 1990); *See United States v. Chiantese*, 582 F.2d 974, 978-80 (5th Cir. 1978); *accord United States v. Yonn*, 702 F.2d 1341, 1345 (11th Cir. 1983) (discretion extends to initial decision whether to interrogate jurors); *United States v. Edwards*, 696 F.2d 1277, 1282 (11th Cir. 1983) (decision within "sound discretion of trial judge especially when the alleged prejudice results from statements made by jurors themselves, and not from media publicity or other outside influences") (additional citations omitted). "No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant asserts juror misconduct." *Cuthel*, 903 F.2d at 1382-1383; citing *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984). Furthermore, the Court found that "[t]he duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of juror impartiality." *Id.* (citation omitted). "To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show 'clear, strong, substantial and incontrovertible evidence .... that a specific, non-speculative impropriety has occurred.'" *Cuthel*, 903 F.2d at 1383; citing *United States v. Ianniello*, 866 F.2d 540, 543 (2nd Cir. 1989) (citation omitted). As to juror misconduct, the Eleventh Circuit found that "'[t]he more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate.'" *Cuthel*, 903 F.2d at 1381; citing *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985). In *United States v. Dominguez*, The Eleventh Circuit Court of Appeals found that the trial court had not abused it's discretion when it declined to grant a mistrial after the questioning of a juror revealed that the jury had begun discussing the facts of the case before the close of

evidence. 226 F.3d 1235, 1245-1248 (11th Cir. 2000). The District Court has wide discretion to investigate, or not, allegations of "juror misconduct." Furthermore, the court has no duty to investigate purely speculative allegations of "juror misconduct," such as appears in Petitioner's case. Thus, there is no error on the part of the trial court. Therefore, Petitioner has also failed to show actual prejudice.

III. Ineffective Assistance of Counsel

In **Grounds Two** and **Three**, Petitioner argues that his trial and appellate attorneys rendered ineffective assistance of counsel when they failed to raise the issue of the Government's failure to provide exculpatory and audit materials to Petitioner as requested. In **Ground Six**, Petitioner claims that his trial and appellate counsel rendered ineffective assistance when they failed to object to or raise the issue of jury deliberations that might have occurred prior to the closing of the evidence.

In order to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate both that (1) his counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that he suffered prejudice as a result of that deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). A court deciding an ineffective assistance claim need not approach the *Strickland* inquiry in the same order or address both components of the *Strickland* inquiry if the prisoner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069; *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (noting that "[b]ecause both parts of the test must be

satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice-versa").

The *Strickland* standard applies to ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991), cert denied, 502 U.S. 1077, 112 S. Court, 981 (1992). To prevail on such claims, a Petitioner must show that his appellate counsel's performance was deficient and that this performance prejudiced the defense. *Id.*

Counsel does not provide ineffective assistance of counsel when frivolous arguments are not raised on appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983); see also *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992). (Attorney not ineffective for failing to argue a meritless issue).

The Sixth Amendment does not even require appellate advocates to raise every non-frivolous issue, *Heath*, 941 F. 2d at 1131. Instead, effective advocates "winnow out" weaker arguments even though the weaker arguments may be meritorious. *Id.* Thus, even though an issue not appealed might have been successful, the appellate advocacy has to be judge in its entirety. *Id.* To determine whether defense counsel rendered ineffective assistance by failing to raise certain issues on appeal, the court must examine the merits of the issues Petitioner alleges his counsel was derelict in not raising on appeal. *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir. 1988). Appellate counsel is not ineffective for failing to raise claims "reasonably considered to be without merit." *Alfred v. Wainwright*, 725 F. 2d 1282, 1291

(11th Cir.), cert denied, 469 U.S. 956, 105 S. Court. 355 (1984).

In **Grounds Two** and **Three**, Petitioner alleges that both his trial and appellate counsel were ineffective for failing to object to the Government's failure to provide the audit materials to Defendant as requested. Petitioner alleges that the Government's failure to turn over these "source documents," constitutes a violation of *Brady* and that trial and appellate counsel were ineffective in that they did not raise the issue. Petitioner additionally argues that Agent Neal testified as an expert and that even if *Brady* does not apply, they were entitled to the materials upon which an expert based his opinion. (Brief in Support of Petitioner's §2255 Motion, pp. 6-11, 16-18). As with many of the facts of this case, Petitioner is misguided. Agent Neal was never tendered as an expert and did not testify as an expert witness. (Trial Transcript Vol. IV, pp. 6-88 and 125). Thus, this allegation will not be considered in **Grounds Two** and **Three**.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). In *United States v. Meros*, The Eleventh Circuit Court of Appeals grouped the requirements of a *Brady* violation, stating:

> To establish a *Brady* violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), *see* [*United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct.

> 3375, 3380, 87 L.Ed.2d 481 (1985)]; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, *see United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988); (3) that the prosecution suppressed the favorable evidence, *see United States v. Burroughs*, 830 F.2d 1574, 1577 (11th Cir. 1987), *cert. denied sub nom. Rogers v. United States*, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988); and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, *see Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383.

United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989).

Although Petitioner cites authority to show that counsel's failure to object to a violation of *Brady* may constitute ineffective assistance of counsel, Petitioner has failed to present any evidence that said documents would constitute *Brady* materials. Additionally, Petitioner has failed to meet the second requirement necessary to establish a *Brady* violation, that he did not possess nor could he obtain said material using reasonable diligence. In his Brief attached to his §2255 Motion, Petitioner states:

> During his response to the Government's arguments, sentencing counsel for Defendant *noted* the fact that certain information which the Government obtained by way of summons from certain sources could not be obtained by Defendant, a problem which was not helped by lack of cooperation by the I.R.S. (S.23-24).

Petitioner has blatantly taken this statement out of context and attempted to apply it to show that Petitioner's

counsel was refused documents by either the Government or the I.R.S. during the course of Discovery or trial. While Sentencing counsel was arguing for the use of the I.R.S.'s calculation of the tax owed, instead of Petitioner's own accountant's computation, he made reference to the 1993 amended return, which was filed January 19, 2001, before Petitioner was indicted. (Trial Transcript, Vol IV, pp. 41-47). On said amended return, Petitioner's accountant notes that the inability to determine the correct tax liability was due to inadequate records and does indeed indicate that he did not have the full cooperation of the I.R.S. (Sentencing Transcript, pp. 23-24). However, that letter makes reference to an attempt to gather information during the I.R.S. investigation and does not have any import as to the availability of records to the Petitioner after indictment. In fact, when the Court questioned what Petitioner had done in advance of the sentencing hearing to correct any miscalculation of tax liability, Sentencing Counsel stated:

> The defendant is working to actually – well, first of all, there's an issue regarding records, and they're scattered between his defense counsel, and the accountant had some, so what we've done is we've tried to pull together the records so we can actually demonstrate the full and accurate amount of income that should have been reported.

(Sentencing Transcript, p.24). Sentencing Counsel's statement indicates that the records were in Petitioner's possession, however disorganized they might have been.

Furthermore, when the Government asked Agent Neal what he examined when conducting the audit, Agent Neal replied that he used: tax returns; the taxpayer's own

books, bank statements, records, and paid bills; statements from the taxpayer; and that he contacted "some businesses, insurance companies, Hancock County Hospital, [the] Department of Medical Assistance. . . . [and] three partnerships [Petitioner] invested in." (R-7, 9-10). The burden is upon Petitioner to prove every requisite of *Brady,* however, no evidence has been presented that these documents, most of which were Petitioner's own documents, were not in Petitioner's possession or were unobtainable using reasonable diligence. Not only has Petitioner failed to meet the requirements of *Strickland*, showing deficiency of either counsel or prejudice, but he has also failed show that a *Brady* violation occurred. There can be no valid claim of ineffective assistance of counsel for failure to object to a *Brady* violation, when no such violation has been established. Therefore, Petitioner's allegations in these two grounds are without merit.

In **Ground Six**, the petitioner contends that his trial counsel was ineffective for failing to object during the trial and appellate counsel was ineffective for failing to raise the issue of jury misconduct to the appellate court, as an issue in and of itself, or as evidence of trial counsel's ineffective assistance of counsel. Petitioner claims that this failure prejudiced him and violated his Sixth Amendment rights because he did not have an opportunity "to learn the extent of their deliberations, nor to receive a ruling from the District Court upon a properly made motion for mistrial." (Petitioner's Brief, p. 36).

As stated above, for ineffective assistance of counsel to be found, a Petitioner must show that his counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 690,

104 S.Ct. at 2066. Notably, Petitioner has failed to present any evidence that any actual deliberation took place before the jury was charged. The "deliberations" that Petitioner refers to was a question received from the jury asking that a principle of accounting that a witness had testified to be explained to the jury. (Trial Transcript, vol. 3, pp. 47-48, March 11, 2003). There is absolutely no evidence that the jurors discussed the facts of the case or began deliberations as to Petitioner's guilt or innocence. However, even if evidence of prior deliberations was presented, the court observed in *Dominguez*, that "when there are premature deliberations among jurors with no allegations or external influence on the jury, the proper process for jury decision-making has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." 226 F.3d at 1248; citing *United States v. Resko*, 3 F.3d 684, 690 (3rd Cir. 1993). The decision to investigate possible juror misconduct is purely within the discretion of the trial court. Trial counsel can not be found to be deficient, or below an objective standard of reasonableness for failing to object to a question that did not indicate juror misconduct, and in which the investigation of, fell purely within the discretion of the district court. As previously stated, appellate counsel is not ineffective for failing to raise claims "reasonably considered to be without merit." *Alford v. Wainwright*, 725 F. 2d 1282, 1291 (11th Cir.), cert denied, 469 U.S. 956, 105 S. Court. 355 (1984).

In Thompson v. Nagle, 118 F.3d 1442, 1450 (11th Cir. 1997), the Eleventh Circuit Court of Appeals set out the standards regarding claims of ineffective assistance of counsel, as follows:

> The Sixth and Fourteenth Amendments entitle a criminal defendant to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Routly v. Singletary*, 33 F.3d 1279 (11th Cir. 1994). A defendant claiming ineffective assistance of counsel must show first that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066. Second, a criminal defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694, 104 S.Ct. at 2068. The burden is on the petitioner to establish both of these elements, *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992), and the burden is a heavy one. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066; *see also Horton v. Zant*, 941 F.2d 1449, 1460 (11th Cir. 1991) (Reviewing courts "should presume effectiveness and should avoid second-guessing with the benefit of hindsight.")

With regard to Petitioner's current claim, he has failed to show that trial counsel's failure to raise the issue at trial nor appellate counsel's failure to raise this issue on appeal was unreasonable or that the results would have been different if either counsel had raised the issue. This Court finds, then, that Petitioner has failed to demonstrate that any action or inaction of Trial or Appellate Counsel during his representation of Petitioner fell outside the range of professional competent assistance. The Court further finds that Petitioner has failed to establish that, but for the actions or inactions of Counsel, the result at

trial would have been different. Thus, Petitioner's claim of ineffective assistance of trial and appellate counsel for failing to raise the issue of jury misconduct and/or ineffective assistance of counsel based on a failure to object to any alleged jury misconduct, must fail.

WHEREFORE, IT IS RECOMMENDED that Petitioner's Motion To Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 be DENIED. Pursuant to 28 U.S.C. § 636(b)(1), Petitioner may serve and file written objections to this Recommendation with the UNITED STATES DISTRICT JUDGE, WITHIN TEN (10) DAYS after being served with a copy hereof.

SO RECOMMENDED this 10th day of November 2005.

S/ G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or was otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The period of limitation shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory

authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

United States Supreme Court Rule

Rule 10(a): Consideration Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

UNITED STATES DISTRICT COURT for the MIDDLE DISTRICT OF GEORGIA LOCAL RULE 83.2

RULES GOVERNING ATTORNEY DISCIPLINE

Prefatory Statement

Nothing contained in these rules shall be construed to deny the Court its inherent power to maintain control over the proceedings conducted before it nor to deny the Court those powers derived from statue, rule of procedure, or other rules of court. When alleged "attorney misconduct" is brought to the attention of the Court, whether by a Judge of the Court, any lawyer admitted to practice before the Court, any officer or employee of the Court, or otherwise, the Court may, in its discretion, dispose of the matter through the use of its inherent, statutory, or other powers; refer the matter to an appropriate state bar agency for investigation and disposition; refer the matter to the local grievance committee as hereinafter defined; or take any other action the court deems appropriate including referring the matter for possible investigation and criminal prosecution. These procedures are not mutually exclusive.

83.2.1 STANDARDS FOR PROFESSIONAL CONDUCT

a. Acts or omissions by an attorney admitted to practice before this court, individually or in concert with any other person or persons, which violate the code of Professional Responsibility or Rules of Professional conduct adopted by this Court shall constitute

misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney/client relationship. Attorneys practicing before this Court shall be governed by this Court's Local Rules of Professional Conduct adopted by the highest court of the state in which it this Court sits, as amended from time to time by that state court, and, to the extent not inconsistent with the preceding. The American Bar Association Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court.

Rule 1.3 (State Bar of Georgia) provides standard of conduct specification for attorneys in Georgia, where it states in relevant part:

> [1] . . . A lawyer should act with commitment and dedication to the interest of the client.

APPENDICES – Appendix ("App.")
District Docket No. 3:02-cr-14 ("Doc.")

Appendix C (checks from Petitioner to Barbara Geter and family)
Doc. 87, Exhibit S

Appendix D (1994 and 1995 returns, prepared by Arthur Smith)
Doc. 87, Exhibit F (F-1)

Appendix E (affidavit of Arthur Smith)
Doc. 87, Exhibit B

Appendix F (amended '94, '95 returns, prepared by Arthur Smith)
Doc. 87, Exhibit F (F-1)

Appendix G (letter: IRS Compliance Dir. Ellen Dolby, 05/10/2004)
Doc. 87, IRS Commissioner Mark W. Everson

Appendix H (report issued by IRS Agent James Kohler, 06/29/2004)
Doc. 87, Exhibit A

Appendix I (Edisel Collier affidavit and amended 1994 return) Doc. 121, Motion for Reconsideration of Restitution and Fine

Appendix J (letters between Petitioner and Atty. Yurachek)
Doc. 87, Letters to Lawyers
From Petitioner (02/05/05, 02/11/05, 02/12/05, 03/21/05)
From Atty. Yurachek (11/01/04, 02/03/05, 02/10/05, 09/23/05

Appendix K (letters between Petitioner and District Court)
Doc. 92 and Doc. 88

Appendix L (Atty. Yurachek's grounds for relief, 2255 motion) Doc. 79

Appendix M (Nancy Brown affidavit and amended 1995 return) Doc. 122

(2)

No. 06-1234

FILED
MAY 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BRADFORD G. BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

BRADFORD G. BROWN
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SUMMARY

Petitioner's counsel for 28 U.S.C. § 2255 appeal (Mark Yurachek) refused to submit to the District Court, as a ground for relief, "Petitioner's 1994 tax liability was zero, which implied evasion for 1994 was not possible". Petitioner informed the court of counsel's conduct in a letter, and requested that the Court remedy the situation by referral to the Grievance Committee for investigation. The Court declined to refer the matter, and wrote letter to Petitioner stating same. The court then ruled on the Yurachek 2255 motion by denying it. This ruling by the court was based on known materially false or incomplete information (abuse of discretion).

Petitioner applied to the Eleventh Circuit for certificate of appealability ("COA"), citing abuse of discretion (among other things). Application for COA was denied. Petitioner applied to the Eleventh Circuit for reconsideration of application for COA, citing abuse of discretion (among other things). Application for reconsideration of application for COA was denied.

Petitioner discovered on or about January 10, 2007 (upon careful review) that his 1995 tax liability was zero, which implied "evasion for 1995 was not possible".

Petitioner applied January 24, 2007 to the Supreme Court for Writ of Certiorari, citing among other things abuse of discretion and innocence (zero tax liability for both conviction years, 1994 and 1995, rendering an assertion of innocence appropriate). Petition for Writ of Certiorari was denied, April 16, 2007. Petitioner began his term of "supervised release" in the summer of 2006.

Petitioner was instructed by the District Court at his sentencing hearing, as follows:

> "During the period of supervision the court shall be notified of any change in your economic circumstances as they pertain to your ability to pay the monetary penalty".
>
> "The court may adjust the payment schedule as the interest of justice requires, and I'm sure you're intelligent enough to know that I don't think that you're going to be able to immediately be able to pay $86,000 a month, but I've got to put something in the order, and we will deal with your situation when the time comes".

See sentencing hearing transcript ("SHT"), page 47, attached hereto as Exhibit A. This is acknowledgement that this was an impossible set of terms of supervised release and that Petitioner was instructed to revisit terms of supervised release "when the time comes".

In response to above instructions, Petitioner filed motions for reconsideration of restitution and fine.

The Probation Department then filed a motion to revoke Petitioner's supervised release, citing "failure to pay fine and restitution". Revocation motion was granted.

At the time of revocation of supervised release, Petitioner had three motions before the District court (which have never been ruled upon). These motions appear in the Case Docket ("Doc") as follows:

Date Filed	Entry #	Motion description
10/23/2006	Doc 121	Motion for Reconsideration of Restitution and Fine. Tax liability for 1994 is zero

		(first conviction year). Response due by 11/15/2006.
01/10/2007	Doc 122	Motion to Amend Motion for Reconsideration of Restitution and Fine. Tax liability for 1995 is zero (final conviction year).
02/26/2007	Doc 130	Motion to Amend Amended Motion for Reconsideration of Restitution and Fine. Zero tax liability for 1996, 1997, 1998, 1999, 2000, 2001 (additional years upon which restitution and fine based). Response due by 03/21/2007.

District Court revoked Petitioner's supervised release on 03/14/2007.

As Petitioner was instructed to notify the District Court of "change in your economic circumstances as they pertain to your ability to pay the monetary penalty", the three pending motions (never ruled upon) before the District Court were Petitioner's attempt to fulfill the District Court's instructions to provide notification.

The three motions pending before the District Court demonstrate that Petitioner owed zero tax liability for all years associated with his order of restitution and fine.

The correct restitution and fine to be associated with a zero tax liability are both zero.

The decision of the District Court to revoke Petitioner's supervised release without ruling on the three motions pending before that court caused said court to punish Petitioner as if his tax liability was not zero for

years of conviction. This is clearly erroneous fact finding, producing an unreasonable conclusion. This is abuse of discretion, as described in *Schiavo v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005).

ARGUMENT

The issue of Petitioner's conviction for tax evasion for years in which he owed no tax and the failure of the District Court to rule on the pending motions which established that fact qualify Petitioner for reconsideration of his Petition for Writ of Certiorari.

CONCLUSION

Petitioner respectfully requests relief from this Honorable Court as follows:

a. grant Writ of Certiorari;

b. remand for Internal Revenue Service ("IRS") certification of Petitioner's returns;

c. stay of supervised release revocation, pending IRS certification;

d. all further relief that this Honorable Court deems just and proper.

This 10th day of May, 2007.

Respectfully submitted,

BRADFORD G. BROWN
Petitioner, pro se
228 Parkway Drive
Sparta, Georgia 31087
(478) 456-6973

CERTIFICATION

This is to certify that I, Bradford G. Brown, do assert upon my solemn oath under the penalty of perjury, that all statements in the above ***PETITION FOR REHEARING*** are true and complete, to the best of my ability, and not advanced for the purpose of delay.

This 10th day of May, 2007.

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(478) 456-6973

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

SENTENCING HEARING

* * *

[47] amount of $86,750 a month for 36 months.

During the period of supervision the court shall be notified of any changes in your economic circumstances as they pertain to your ability to pay the monetary penalty.

The court may adjust the payment schedule as the interest of justice require, and I'm sure you're intelligent enough to know that I don't think that you're going to immediately be able to pay $86,000 a month, but I've got to put something in the order, and we will deal with your situation when the time comes.

The Court reserves the opportunity to address any outstanding balance prior to the conclusion of your term of supervision. At that time the Court will consider all available sanctions, including civil remedies available through the United States Attorney's Office.

The prison term is to be followed by a term of supervised release of three years to include the standard and mandatory conditions of supervised release and the following special conditions.

First, you are prohibited from owning a firearm or other dangerous weapon. And let me elaborate on that and make sure you understand that that means from this point on, whether you are on supervised release or after, you cannot own any firearm.

I don't know whether you hunt or have any interest in

* * *